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No. _____

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FEB 15 1984
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ALFRED L. EASTERDAY,

Petitioner,

v.

DONALD W. COYER and
FRED L. ENGLE, d/b/a RESOURCE
SERVICE COMPANY, and JAMES G. WATT,
Secretary of the Interior,
U.S. DEPARTMENT OF THE INTERIOR,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Should a court substitute its own preferences for that of the Congress by rewriting regulations to permit heretofore prohibited acts?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

The petitioner, Alfred L. Easterday, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on November 4, 1983.

OPINIONS BELOW

The substantive final decisions of the Interior Board of Land Appeals are reported as Alfred L. Easterday, 34 I.B.L.A. 195 (1978), Coyer v. Easterday, 36 I.B.L.A. 181 (1978), and Donald W. Coyer, et al., 50 I.B.L.A. 306 (1980). The United States District Court for the District of Wyoming affirmed the Interior Board of Land Appeals in an unreported decision. The United States Court of Appeals for the Tenth Circuit reversed the district court in an opinion reported as Coyer v. Watt, 720 F.2d 626 (10th Cir. 1983). The Court of Appeals'

decision relied upon Lowey v. Watt, 684 F.2d 957 (D.C.Cir. 1982).

JURISDICTION

The judgment for which review is sought was entered by the United States Court of Appeals for the Tenth Circuit on November 4, 1983. Petition for rehearing, and suggestion for rehearing en banc, was denied on November 28, 1983. The case was mandated back to the district court on December 6, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTE AND REGULATIONS INVOLVED

1. This suit involved the application of §226(c) of the Mineral Leasing Act of 1920, 30 U.S.C. §226(c), which provides:

> §226. Lease of oil and gas lands.
>
> (c) Lands subject to leasing under subsection (b); first qualified applicant.

If the lands to be leased are not subject to leasing under subsection (b) of this section, [which covers lands which are either within any known geological structure of a producing oil or gas field or within a special tar sand area,] the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12-1/2 per centum in amount or value of the production removed or sold from the lease.

2. Applicable provisions of the Interior Department Regulations, 43 C.F.R. §§3100.0-5(b), 3102.7, 3112.5-2, are:

§3100.0-5. Definitions.

(b) Sole party in interest. A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously

filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An "interest" in the lease includes, but is not limited to, record title interests, over-riding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

§3102.7. Showing as to sole party in interest.

A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not, he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if

written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is canceled.

§3112.5-2. Multiple filings.

When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to §3110.1-6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the

agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bona fide purchaser as provided for in §3102.1-2 interevene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued.

STATEMENT OF THE CASE

Under the Mineral Leasing Act of 1920, 41 Stat. 443, 30 U.S.C. §226, the Secretary of the Interior is authorized to award oil and gas leases for public lands. Section 226(c) provides that as to public lands which are not within any known geologic structure of the producing oil or gas field, "the person

first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding."

However, pursuant to authority granted by 30 U.S.C. §189, the Secretary has set up a lottery system in which the Bureau of Land Management announces that certain lands are available for leasing and sets a deadline for the receipt of applications, which must be filed on standard drawing entry cards. All applications received by the deadline are deemed to have been filed simultaneously, and drawing entry cards are drawn at random to determine who will be awarded the leases. 43 C.F.R. §3112.1-2, §3112.2-1 (1977). This system was approved in Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C.Cir.), cert. den. 373 U.S. 951 (1963).

The secretary may decline to lease a parcel of land even after the drawing

is held and a qualified applicant is accepted. McTierman v. Franklin, 508 F.2d 885, 887 (10th Cir. 1975). However, if the Secretary decides to award a lease, he must award it to the first drawee, provided that such drawee is qualified under the regulations, and provided that such drawee pays the first year's rent under the lease within 15 days of notification of the lease award. 43 C.F.R. §3112.2-1, §3103.3-2 (1977). If the first drawee does not meet these criteria, the award goes to the next succeeding drawee who does meet them. 43 C.F.R. §3112.2-1, §3112.4-1 (1977). Only three drawing entry cards are drawn, so if none of the three drawees are qualified, a new lottery is held for that parcel of land. 43 C.F.R. §3112.5-1 (1977).

The regulations governing the lottery system have been issued by the Department of the Interior in order to

ensure that each lottery is conducted fairly. The sole-party-in-interest regulation, 43 C.F.R. §3102.7 (1977), requires that each lease applicant ("offeror") disclose on his drawing entry card all parties having an "interest" in the application ("offer"), with "interest" defined by 43 C.F.R. §3100.0-5 to include any

> claim ... to an advantage or benefit from a lease ... or any defined or undefined share in any increments, issues, or profits which may be derived from ... the lease based upon or pursuant to any agreement or understanding existing at the time when the application or offer is filed.

This disclosure requirement

> is predicated on the departmental policy that all offerors and other parties having an interest in ... offers to lease shall have an equal opportunity for success in the drawings.

43 C.F.R. §3100.0-5(b). Such disclosure also provides the "means for maintaining adequate records of acreage holdings," id., so as to facilitate enforcement

of the acreage limitations of 43 C.F.R. §3101.1-5(a).

The departmental policy of equal opportunity is also reflected in the multiple-filing regulation, 43 C.F.R. §3112.5-2 (1977), which forbids any two parties to enter into "any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease or interest therein." It further forbids

> any agent or broker to file an offer to lease [i.e., a drawing entry card] for the same lands on behalf of more than one offeror [i.e., applicant] under an agreement that, if a lease issues to any such offerors, the agent or broker will participate in any proceeds derived from such lease.

Beginning in 1973, Resource Service Company (R.S.C.) operated as a leasing service. For a fee, R.S.C. would prepare and file drawing entry cards for individual clients. Each drawing entry card represented that the individual client named theron was the sole party in interest.

However, the services of R.S.C. to each client were performed pursuant to a standard service agreement which included an exclusive sales agency provision granting R.S.C. an exclusive right to negotiate sales or assignments of any leases won, and to receive a percentage of the proceeds thereof, for a period of five years, subject to the right of the client to reject any or all sales or assignments negotiated by R.S.C. This exclusive sales agency provision was not disclosed as an interest on any drawing entry card prepared and filed by R.S.C.

In December, 1976, a protest was filed with the Wyoming State Office of the Bureau of Land Management by a second drawee demanding the disqualification of several R.S.C. clients who were the first drawees in the previous month's drawing. The protest alleged that the exclusive sales agency provision in each service agreement was an "interest" in a lease, and that

therefore the nondisclosure of the same on each drawing entry card was a violation of the sole-party-in-interest regulation. The protest further alleged that R.S.C. violated the multiple-filing regulation by filing drawing entry cards for more than one client on each of a number of parcels.

The Wyoming office of the Bureau of Land Management sustained the protest and disqualified the drawing entry cards. However, R.S.C.'s attorney prevailed upon three employees of the Wyoming office not to disqualify any other entries, pending departmental appeal, in exchange for a disclaimer of the challenged provision.

Subsequently, R.S.C. executed a document entitled "Amendment and Disclaimer," which stated that the challenged provision was disclaimed, except that if a determination were made following exhaustion of all administrative and judicial remedies that the challenged provision were not

an interest in a lease, then the "Amendment and Disclaimer" would be null and void as if never executed. However, R.S.C. continued to use the standard service agreement, including the provision challenged, and it communicated the "Amendment and Disclaimer" only to (1) the Wyoming and New Mexico offices of the Bureau of Land Management, and (2) those clients of R.S.C. who won drawings. No R.S.C. client was informed of the "Amendment and Disclaimer" before that client won a drawing. Whether R.S.C. actually communicated the "Amendment and Disclaimer" to a client at any time cannot be verified. R.S.C.'s form-letter notice to a winning client makes no mention of the "Amendment and Disclaimer." The disclaimer was also unsupported by consideration.

In March, 1977, the Wyoming office of the Bureau of Land Management determined that the exclusive sales agency provision in the service contract did constitute

an interest in the lease, thus upholding the protest. This determination was upheld in two related cases decided by the Interior Board of Land Appeals: Lola I. Doe, 31 I.B.L.A. 394 (1977), and Sidney H. Schreter, et al., 32 I.B.L.A. 148 (1977). Although R.S.C. was a party to both of these cases, it chose not to appeal them, and, after the time for appealing expired, it revised its service contracts at the insistence of the Wyoming office, but not until April, 1978 (Record, VIII, Ex.32).

Meanwhile, in April, 1977, a regular monthly drawing was conducted by the Wyoming office. With respect to Parcel No. WY-44, the first card drawn was that of Donald W. Coyer, a client of R.S.C., and the second was that of Alfred L. Easterday. Easterday protested the issuance of the lease to Coyer, claiming that Coyer was unqualified because of violations of the sole-party-in-interest regulation and of the multiple-filing regulation.

Although the Wyoming office had upheld the earlier protest, it dismissed Easterday's protest of the award to Coyer, finding that although R.S.C.'s service agreement created an interest, and although R.S.C. would have been in violation of both regulations, the disclaimer document was effective and cured the violations.

Easterday appealed to the Interior Board of Land Appeals, which reversed the Wyoming office and upheld Easterday's protest in Alfred L. Easterday, 34 I.B.L.A. 195 (1978), holding that not only were both regulations violated, but also that the violations were not cured by the disclaimer document. Neither Coyer nor R.S.C. responded or appeared before the Board even though Coyer was served with a notice of appeal. They deliberately declined to participate in the proceedings, Easterday, supra, at 196. The multiple-filing regulation was found violated in that R.S.C. filed over

200 drawing entry cards on Parcel WY-44.

Pursuant to Easterday, the Wyoming office rejected Coyer's lease offer. Coyer and R.S.C. appealed, but the rejection was upheld by the Board in Coyer v. Easterday, 36 I.B.L.A. 181 (1978). Coyer and R.S.C. also sought judicial review of Alfred L. Easterday, supra, on the false ground that since they had been given no notice of the proceedings before the Board, and had had, therefore, no opportunity to participate therein, they had suffered a violation of their due-process rights. The district court, which had jurisdiction of the matter under30 U.S.C. §226-2, remanded the matter to the board for a full evidentiary hearing. Coyer v. Andrus, D.Wyo. Civ.No. C-78-104K (1978).

After conducting such a hearing, the Interior Board of Land Appeals found that Coyer and R.S.C., by their own admission, had had adequate opportunity to appear

before the Board in Easterday, but had failed to do so. Therefore, not only was there no violation of their due-process rights, but there was nothing further to litigate, the matter being res judicata. Donald W. Coyer, 50 I.B.L.A. 306 (1980).

The Board further held, noting that "transactions of the United States relating to the management, use and disposition of public lands and their resources are for the benefit of all the people," id. at 321, that the amendment and disclaimer procedure of R.S.C. did not promote federal policies because

> To give effect to such an arrangement would establish a precedent that would allow open ... [flouting] of the prohibition against multiple filings and foreclose the Department from preventing flagrant abuses of the drawing-lottery system.

Id. at 320.

Meanwhile, the "Amendment and Disclaimer" document was also held ineffective to eradicate R.S.C.'s interest in leases in Frederick W. Lowey, 40 I.B.L.A. 381

(1979), aff'd sub nom. Lowey v. Watt, 517 F.Supp. 137 (D.D.C. 1981).

The United States District Court for the District of Wyoming affirmed Donald W. Coyer, supra, on a motion for summary judgment. Its memorandum decision is unreported. Coyer and R.S.C. appealed to the United States Court of Appeals for the Tenth Circuit. Even though the record demonstrated that Coyer and R.S.C. made a false allegation of denial of due process, the Court of Appeals reversed the district court, Coyer v. Watt, 720 F.2d 626 (10th Cir. 1983), relying on Lowey v. Watt, 684 F.2d 957 (D.C.Cir. 1982), which found the disclaimer document valid on the strength of R.S.C.'s assertion of good faith.

REASONS FOR GRANTING THE WRIT

The management of public lands has been delegated to the Congress and not the Courts. It is within the power of the Congress to enact laws. The decision of the court of appeals, in effect, enacts legislation governing the issuance of leases to federal lands, in a way that severely prejudices the ability of the Secretary of Interior to award oil and gas leases to the public in a fair manner.

This petition should be granted to settle definitively the question of entitlement to federal oil and gas leases, and to maintain equality of opportunity.

I. The Court Should Not Rewrite Regulations Which Fall Within the Expertise of the Secretary of Interior.

The Interior Department is charged by law with the operation and administration of the oil and gas leasing program, under which members of the public are awarded leases of public lands for the purpose of exploiting the mineral resources thereof. 30 U.S.C. §226. In order to ensure that all parties "have an equal opportunity for success" in obtaining leases, 43 C.F.R. §3100.0-5(b), specific procedures have been established to determine to whom leases will be awarded.

Essentially, each party desiring to lease a particular parcel of public land must enter a lottery for that particular parcel. Three entries are drawn, and the first qualified drawee is entitled to the lease. If no one is qualified, another lottery is held.

Federal regulations set forth explicit

requirements which one must meet in order to be considered qualified. Among the requirements are the following: (1) The lease applicant ("offeror") must be a United States citizen; (2) He must not be an employee of the Department of the Interior; (3) He must not already hold leases on more than the maximum amount of acreage permitted; (4) He must not file more than one application on any particular parcel; (5) The application must be filed on a standard drawing entry card (DEC); and (6) Anyone having an interest in the lease offer, including anyone having a legally enforceable right to share in the proceeds of the lease, must be disclosed when the lease application is filed.

This last requirement, disclosure, is intended to facilitate the enforcement of the preceding requirements. However, the Court of Appeals has now permitted

applications which violate this regulation, and which are thus invalid, to be considered valid nevertheless.

There is no provision in the statutes or in the regulations which permits a lease offeror to correct defects in his filed offer. The Court of Appeals should not fill such void, particularly where, as here, the lease offer was invalid because of knowing, intentional, deliberate, and sustained refusals to eliminate an exclusive agency arrangement. The manner in which the court permitted the "cure" of an offer which otherwise warranted disqualification renders advisory, in substance, regulations which were heretofore considered mandatory.

The Secretary must now determine if the offeror was in good faith when he filed his offer.

An applicant's good faith is not an

exception to disqualification. If the Congress or the Department so intended, they would have so prescribed.

The Interior Board of Land Appeals, in its opinion, said there is no excuse for violating the regulations. This is especially true when a filing service is involved. It is unclear how, or why, an agency should have regulations dealing with the curing of concealed, unlawful conduct. See Reed v. Morton, 480 F.2d 634, 645 (9th Cir.), cert. den., 414 U.S. 1064 (1973).

The Board stated that there is no reason why the regulations or adjudicatory precedents should provide for the eradication of forbidden interests relating to leases of public lands. The regulations are abundantly clear in defining forbidden interests and there is no justifiable reason for such interests to exist.

There can be no dispute that R.S.C. had contractually provided itself with an interest in every lease offer which it filed on behalf of its clients. In failing to disclose this interest and, instead, representing that each client was a "sole party in interest," each R.S.C. lease offer violated 43 C.F.R. §3102.7.

By such failure to disclose, R.S.C. was enabled to file multiple offers in the names of its clients on the more desirable parcels, thereby enhancing its mathematical chances of acquiring an interest in the property for itself, in violation of 43 C.F.R. §3100.0-5(b). In addition thereto, the exclusive agency provision gave R.S.C. the opportunity to select the assignee oil company in marketing the lease. This was clearly a scheme to defeat the safeguards intended to protect the integrity of the system for making federal oil and gas leases

available to the public on an equitable basis.

R.S.C. filed thousands of lease offers annually. The interests it had in those leases were undisclosed.

When these undisclosed interests were finally revealed and R.S.C. was directed to revise its contract or face the rejection of its lease offers, R.S.C. opted to propose a self-serving cure for the problems created by the exclusive agency agreement.

The "cure" essentially consisted of a promise by R.S.C. not to enforce the exclusive agency agreement if it in fact created an interest as defined by the regulations. The promise was contained in a written instrument called an "Amendment and Disclaimer," which was not communicated to any client of R.S.C., unless and until a client was declared to be a winner in a drawing.

R.S.C. would then have the client enter into a new exclusive agency agree-

ment, which was executed after the drawing, and which was therefore claimed to be in compliance with the regulations.

The "Amendment and Disclaimer" cure improvised by R.S.C. is described in Lowey v. Watt, 684 F.2d 957, 961. In its opinion the court mistakenly assumed that no one questioned R.S.C.'s good faith.

The Lowey court blamed Congress and/or the Department of Interior for making R.S.C.'s scheme necessary by failing to provide, by statute or regulation, a procedural mechanism "for removing illegal provisions from standard leasing service contracts." The court also mistakenly assumed that the Bureau of Land Management had both motive and ability to make certain that R.S.C. abided by its promise. Lowey, supra, at 966.

However, RSC was fully cognizant of its own overreaching conduct and concealed this from the Bureau. Once it

was revealed to the Bureau that R.S.C. was using an exclusive sales agency agreement, everything that R.S.C. did to effect a cure resulted from its adamant refusal to acknowledge that it had an "interest" in its clients' leases, as "interest" is defined in 43 C.F.R. §3100.0-5(b).

The definition of interest is so broad and all-encompassing that there could be no reasonable basis for doubt that R.S.C. had created and retained such an interest.

All R.S.C. had to do to comply with the regulations was to disclose that interest and file the required statements.

In every case that had come before the Interior Board of Land Appeals for determination, R.S.C.'s disclaimer, when at issue, was determined to be an ineffective cure for violating the regulations. Every district court had sustained the Board in that regard.

In Lowey, supra, at 967, the court

ruled that a filing service's reasonable efforts to cure a defect in its contracts with its clients are sufficient to eradiate the interest created by the exclusive agency agreement. However, in discussing the exclusive sales provision, the Lowey court betrayed a fundamental misapprehension of the system and the Regulations.

The Lowey court stated that RSC's standard agreement forms contained a provision of doubtful legality under the applicable Interior Department regulations. If the provision did in fact violate the regulations, the court said, no application filed by RSC would be valid.

That last statement is obviously in error.

As the government argued in its petition for rehearing in Lowey, the exclusive sales agency agreement

> was a perfectly legal consensual agreement between the contracting parties, and it created an entirely

> legitimate interest in RSC which Engle had every right to enforce -- as could RSC clients enforce it against Engle if he failed to perform as their sales agent. Neither the IBLA nor the district court found anything wrong with the contract provision or the interest it created. What was wrong was Engle's failure to disclose that interest as prescribed in 43 CFR 3102.7 and Engle's practice in filing multiple offers in which he had such undisclosed interest on the same parcels of land in order to enhance RSC's own prospects of success (while, incidentally, diminishing those of his clients) in violation of 43 CFR 3112.5-2.

The regulations do not permit a cure of defective filings and specifically do not permit Bureau of Land Management employees to qualify otherwise unqualified applicants upon some undefined showing of "good faith" accompanied by "reasonable efforts" to cure defects.

However, the court in effect requires the Bureau of Land Management to make two judgment calls not provided for by the regulations when an offeror may be otherwise disqualified: (1) Did the applicant act in good faith? (2) Did the applicant demonstrate reasonable efforts to cure the defect?

Neither of these standards are provided by the regulations. Yet if both answers are in the affirmative, the Bureau must award the lease.

This creation of a cure mechanism amounts to impermissible judicial legislation, and to allow such a result to stand will result in a bureaucratic nightmare.

Each "disqualified" offeror can avail himself of the opportunity to demonstrate his good faith and his reasonable efforts to cure defects, thereby requiring the Bureau to make independent individual determinations without regard to the regulations.

In the final analysis, these decisions of the Courts of Appeals are an open invitation to those who have the means and motive to manipulate the system to achieve a coveted result. This can lead to a profusion of post lease award litigation and a total breakdown of trust and integrity in the oil and gas leasing program.

The Court abrogates the long-standing rule of deference to agency regulations and engages in impermissible legislation. Udall v. Tallman, 380 U.S. 1 (1965); Marathon Power Co. v. EPA, 608 F.2d 334 (9th Cir.1979); Western Union Telegraph Co. v. Lexroot, 323 U.S.490 (1945); Fisher Flowing Mills Co. v. U.S., 270 F.2d 27 (9th Cir. 1959); Liberty Mut.Ins. Co. v. Horton, 275 F.2d 148, aff'd 367 U.S. 348 (1960).

II. Ability of Government to Conduct Fair Lottery Severely Prejudiced

The decision of the United States Court of Appeals for the Tenth Circuit sanctions the award of leases to unqualified parties who knowingly violate regulations in order to increase their chances of winning such awards. Thus, although "an overarching policy of fairness is intrinsic to the program," Lowey v. Watt, 684 F.2d 957, 967 (D.C.Cir. 1982), qualified and innocent participants in the program are denied lease awards because the government is rendered powerless to enforce its own regulations.

The Department of the Interior has the responsibility to conduct its oil and gas lottery programs so as to give everyone an equal opportunity to win the lottery held for each lease. It is "departmental policy that all ... parties ... have an equal opportunity for success in the drawings." 43 C.F.R. §3100.0-5(b).

Federal regulations forbid any party to have an interest in more than one lease offer on any one parcel. 43 C.F.R. §3112.5-2. This is to promote the public policy of ensuring to all an equal opportunity for success in the drawings. 43 C.F.R. §3100.0-5. Further, there are limitations on how much public land one party can lease at any one time. This is to ensure that as many parties as possible have an opportunity to obtain a lease without making the leased areas too small to be worth exploiting.

To facilitate the enforcement of these regulations, it is required that each applicant for a lease disclose all parties who have, at the time the drawing entry card (DEC) is filed, a legally enforceable right to participate in the proceeds of a lease. Otherwise, the offer to lease is void.

This disclosure requirement is not just so much red tape that lease applicants must contend with. Rather, the govern-

ment is entitled to know the identities of parties who have acquired or seek to acquire interests in federally owned lands so that it can administer the program fairly, keep accurate records, and prevent multiple filings that create unfair advantages. With thousands of entry cards filed for each drawing, the Secretary of the Interior properly insists on strict compliance with the regulations, including the disclosure requirement, so as to prevent unqualified parties from obtaining leases through artifice, e.g., by using "straw men" to hide their identities and to avoid detection of their disqualifications.

In this case, R.S.C. devised a scheme to circumvent these safeguards designed to protect the integrity of the system and ensure the availability of lease opportunities to the public on an equitable basis. The Court of Appeals permitted R.S.C. to improvise an ad hoc cure to its knowing violations

of regulations, thus permitting it to flout the regulations with impunity and giving it a decided advantage over honest citizens who competed fairly.

It is clear that the exclusive sales agency in the service contracts under which R.S.C. filed entry cards for its clients gave it an "interest" in each lease won by its clients, for the contracts gave R.S.C. a legally enforceable right to share in the proceeds of its clients' leases. Moreover, R.S.C. knew that its service agreement created an interest in each lease and 43 C.F.R. §3100.0-5 clearly says so. Further, R.S.C. was a party to two cases holding that such contractual provisions constituted interests, and R.S.C. appealed neither case. Lola I. Doe, 31 I.B.L.A. 394 (1977); Sidney H. Schreter, et al., 32 I.B.L.A. 148 (1977).

Since at least 1967, the Interior Department has held that exclusive sales agency agreements entered into prior

to the time of a drawing must be disclosed. John V. Steffans, 74 I.D. 46 (1967). Also, 43 C.F.R. §3102.7 requires the disclosure of interests in leases. Therefore, R.S.C. was required to disclose its interest in every lease offer it filed, but it knowingly failed to do so.

By such failure to disclose, R.S.C. was able to file multiple offers in the names of various clients on the more desirable parcels, thereby enhancing its mathematical odds of acquiring an interest in those parcels. Obviously, if R.S.C. files entry cards for over 200 clients on a single parcel, it has over 200 chances to acquire an interest, while everyone else has one chance, except to the extent that R.S.C.'s competitors practice the same scheme.

Abuses of the system became so widespread that on February 29, 1980, the Secretary of the Interior issued an order, Secretarial Order No. 3049,

suspending the issuance of oil and gas leases under the lottery program. A news release from the Office of the Secretary, dated the same day, quoted the Director of the Bureau of Land Management to the effect that the leasing system "has been subjected to such thorough manipulation that the possibility of lawful, bona fide participants successfully obtaining a lease has in many cases been reduced to a very low level."

The failure of leasing services to disclose their interests as they were required to do under federal regulations also opened the door to violations of the acreage limitations, for "such disclosures provide the means for maintaining adequate records of acreage holdings." 43 C.F.R. §3100.0-5(b). Yet, in spite of all the abuses that nondisclosure of interests can lead to and has led to, the court of appeals has provided a method by which violations can be perpetuated.

R.S.C. began operations in 1973, and its undisclosed interests went undetected until late 1976, when a member of the public protested an award of a lease to a client of R.S.C. Bureau of Land Management personnel at the Wyoming State Office informed R.S.C. that it would have to revise its service contract to eliminate its interest in its clients' leases, or face rejection of its clients' lease offers. Instead of so revising the standard service contract, or disclosing its interest on drawing entry cards filed on behalf of its clients, R.S.C. opted to deny that it had any interests in its clients' leases.

R.S.C. convinced three mid-level employees of the Bureau of Land Mangement to accept the filing of a disclaimer document and refrain from rejecting offers of R.S.C.'s clients at least until the controversy could be resolved at a higher level.

However, R.S.C. did not send a copy of the disclaimer to all its clients. Rather, when a client won a lease award, R.S.C. would ask him to sign a new exclusive agency agreement.

However, the Interior Board of Land Appeals held that R.S.C.'s use of the "disclaimer" was impossible to police and permitted open flouting of the regulations. Donald W. Coyer, 50 I.B.L.A. 306, 320 (1980).

Moreover, permitting unlawful offers to be accepted because of a dubious ad hoc "cure" of intentional and knowing wrongdoing works an injustice on the innocent. It denies to qualified second drawees, in favor of unqualified first drawees, their legitimate right and entitlement to lease awards that they by law ought to receive. Even if R.S.C.'s clients were wholly innocent, their lease offers were invalid ab initio, for the sins of the agent are visited upon the principal. Where an entry card is invalid

when filed, to allow the first drawee to subsequently cure the invalidity "infringe[s] on the rights of the second-drawn qualified offer." Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067, 1070 (10th Cir. 1976); Runnells v. Andrus, 484 F.Supp. 1234 (D.Utah 1980).

The innocent clients of R.S.C., victimized by its misdeeds, would have a remedy if their leases were invalidated: they could sue R.S.C. for damages. The innocent second drawees, however, would be without remedy. They would be in the unenviable position of having suffered an unrightable wrong for following the rules and competing fairly, while those who broke the rules and competed unfairly would be generously rewarded.

The general public is the loser when equality of opportunity is eroded by systematic abuse. The general public is the loser when a "cure" for regulatory violations found ineffective by the Interior Board of Land Appeals and the

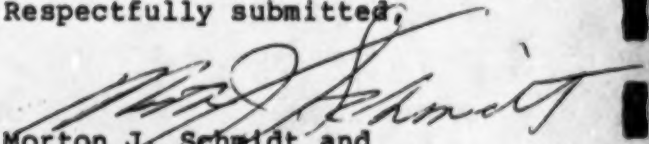
U.S. District Court is found effective by the Court of Appeals when permitting such a "cure" makes the government virtually powerless to ensure the integrity of the oil and gas leasing system.

Further, to allow a knowing, intentional, and deliberate violator to, when caught, design a "cure" not authorized by statute, regulation, or prior court decision sets a dangerous precedent. Rather than promoting the rule of law, it is an open invitation to flout the law. Rather than binding the unscrupulous in the chains of the law, it invites them to undermine equality of opportunity for all by taking advantage of the average citizen's inclination to compete fairly and honestly.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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Dated: February 9, 1984

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 81-1415

SLIP OPINION

DONALD W. COYER and FRED L. ENGLE, d/b/a RESOURCE SERVICE COMPANY,

Plaintiffs-Appellants,

v.

JAMES G. WATT, Secretary of the Interior, United States Department of the Interior; ALFRED L. EASTERDAY; J. ROE; and WYOMING STATE OFFICE, BUREAU OF LAND MANAGEMENT, United States Department of Interior,

Defendants-Appellees.

Appeal from the United States District Court for the District of Wyoming
(D.C. Nos. C78-104K, C80-370K and C80-372K)

[Filed November 4, 1983]

Before: DOYLE, McKAY and SEYMOUR, Circuit Judges.

DOYLE, Circuit Judge.

The plaintiffs appeal the district court order affirming the ruling of the Interior Board of Land Appeals (IBLA) which rejected plaintiffs' first Drawing Entry Card (DEC) for failure to comply with 43 C.F.R. §3102.7 (1970). This is a regulation which has been issued by the Department which reads as follows:

> A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than fifteen days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer.

Don Coyer entered into a service agreement with the Resource Service Company

(RSC), which is a filing company founded in 1973 by Fred L. Engle, which submits non-competitive oil and gas lease offers on behalf of its clients pursuant to a standard service agreement which provides in pertinent part as follows:

> If I am successful in a drawing, I hereby authorize you to act as my sole and exclusive agent to negotiate for me and on my behalf . . . any right I obtain by reason of being successful in a drawing for the best price obtainable by you. Any final negotiated price is subject to my approval. If you have successfully negotiated a sale . . . I hereby agree to pay you for your services in accordance with the schedule detailed below. [The scheduled fees ranged from twelve to sixteen percent depending upon the amount of the sale price. A similar schedule existed for overriding royalty payments, if any, negotiated for the client.] This agency to negotiate shall be valid for a period of five (5) years.

Donald Coyer, as we have noted, entered into this service agreement on January 5, 1977. On January 13, 1977, fearful that its service agreement might constitute an improper undisclosed interest under 43 C.F.R. §3102.7, RSC filed a disclaimer

with the BLM which stated in pertinent part:

> I, Fred Engle, d/b/a Resource Service Company, do hereby state and aver that I do hereby waive and renounce my exclusive agency which I may have by reason of said service agreements with said offerors from and after this date.

The disclaimer also provided that in the event the brokerage provision in the service agreement was deemed not to create an interest in RSC, the disclaimer was null and void. It was hoped that this disclaimer would eliminate the contested provision and avoid RSC's having to renegotiate a thousand agreements already in existence. Engle also agreed to notify each of RSC's winning clients that RSC disclaimed its brokerage right under the service agreement. The BLM agreed to accept the disclaimer, but warned RSC that the validity of the document was subject to review by the IBLA.

In May 1977 Coyer's DBC was drawn

first in a Wyoming lottery. Alfred Easterday, the second drawee, filed a protest challenging Coyer's qualifications to be granted a lease. The BLM dismissed Easterday's protest finding that, although the service agreement created an interest in RSC which was not properly disclosed, the disclaimer cured the defective DEC. Easterday appealed the ruling to the IBLA. Although notified of the appeal, neither Coyer nor RSC participated in the appellate proceeding. On March 22, 1978, the IBLA reversed the BLM finding and held RSC's disclaimer ineffective to cure Coyer's DEC because the disclaimer had not been communicated to Coyer prior to the drawing and because Coyer had not given any consideration to RSC for the disclaimer.

Coyer thereupon filed a complaint in the district court in which he sought review of the IBLA's decision. The court determined that the administrative record

was insufficient to permit adequate review. As a consequence, the case was remanded to the BLM for further proceedings. An administrative law judge (ALJ) conducted a hearing in which all parties participated. The ALJ determined that the disclaimer was ineffective to cure RSC's undisclosed interest. The ALJ's findings were adopted by the IBLA. Coyer v. Easterday, 50 IBLA 306 (1980).

The case was again appealed to the district court. Cross motions for summary judgment were filed. After conducting an evidentiary hearing, the court granted Easterday's motion finding that the IBLA's ruling was not arbitrary, capricious, an abuse of discretion or contrary to the law. This appeal followed.

WHAT IS THE EFFECT OF A DISCLAIMER?

In the case between RSC customers and the government, involving facts virtually identical to those here, the District

of Columbia Court of Appeals held that RSC's disclaimer was sufficient to eliminate any impermissible or undisclosed interest in the lease of a first drawee. Lowey v. Watt, 684 F.2d 957 (D.C. Cir. 1982).[1]

The opinion of the District of Columbia Court of Appeals, which was written by Judge Wright, held that RSC's disclaimer was a reasonable effort to protect itself and its clients in the face of uncertain regulatory requirements.

Judge Wright held that the action taken by RSC is consistent with the purposes of the non-competitive leasing program and with basic principles of contract law. The non-competitive leasing program

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1. The government, in Lowey, petitioned for rehearing and rehearing en banc. Both petitions were denied. According to counsel for the government in the case sub judice, the government chose not to petition for certiorari in Lowey.

represents an effort to provide equal access to oil and gas leases.

The regulations governing the program do not prescribe any particular method for waiving impermissible interests before applications are filed. The District of Columbia Court of Appeals held:

> If we were to hold, as a matter of common law, that a filing service's reasonable efforts to cure a defect in its contracts with its clients were insufficient, our decision would not only penalize blameless individuals like the individual appellants in these cases, but it would have a deleterious effect on the program as a whole.

Lowey, supra, at 976.

Filing services would be forced to take costly precautions, effectively excluding all but the wealthy from using this egalitarian program.

Contract law principles also support a finding that RSC's "amendment and disclaimer" effectively terminated any interest it may have had in its customers' leases.

The Restatement (Second) of Contracts §89 (1981) provides:

> A promise modifying a duty under a contract not fully performed on either side is binding
>
> > (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made....

Comment b to Section 89 explains that the "fair and equitable" standard contemplates both the absence of coercion and a "demonstrable reason for seeking a modification."

The District of Columbia Circuit properly held that the circumstances surrounding RSC's disclaimer of its right to enforce its exclusive sales provision fit RSC's action squarely within this legal principle. Neither RSC nor its clients anticipated that the provision might undermine the clear purpose of the contract. Indeed to reach a result other than that which has been indicated would place a heavy burden on the clients and it would be unjustified. RSC's unilateral waiver

of its rights was the most speedy and cost-efficient way to protect the interests of its clients. The need for the change was clear, and RSC was certainly not coerced into relinquishing its rights under the contract. Its formal unilateral modification is thus binding, and does away with any interest the clause might have conveyed to RSC in leases obtained by RSC's clients.

It is true that this court is not bound to follow the ruling of the District of Columbia Circuit but we find that the Lowey case is persuasive and should be followed and that the interests of all the parties are served thereby.

Thus the case should be reversed and remanded to the district court for action consistent with this opinion.

OPINION OF INTERIOR BOARD OF LAND APPEALS
IN ALFRED L. EASTERDAY, 34 I.B.L.A. 195
1978

IBLA 78-73 - Decided March 22, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, dismissing protest against issuance of oil and gas lease W-59232.

Reversed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sub-lease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing

service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein. Such an agreement creates for the leasing service an interest in the lease as that term is defined in 43 CFR 3100.0-5(b).

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined by this Department

to create an interest in the lease for the service, and the service files a waiver of that interest with the BLM prior to a simultaneous drawing, without communicating such waiver to the client, and without any contractual consideration running from the client to the leasing service, the waiver is without effect as a matter of law and the successful drawee is required to make a showing as to sole party in interest under 43 CFR 3102.7.

3. Oil and Gas Lease: Applications: Drawings

A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information.

APPEARANCES: Morton J. Schmidt, Esq., Morton J. Schmidt & Associates, Ltd., Milwaukee Wisconsin, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Alfred L. Easterday has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM) which dismissed his protest to the issuance of oil and gas lease W-59232 to Donald W. Coyer.

Appellant filed a protest after Coyer's filing card was drawn first for parcel No. 44 in the May 1977 simultaneous drawing held in the Wyoming State Office, BLM. Appellant charged an alleged violation of 43 CFR 3112.5-2 [1] which prohibits multiple filings. Appellant pointed out that prior to the drawing Coyer had executed a service agreement with his filing agent, Resource Service Company (RSC), which provided for a service fee and royalty payment in force at the time of the drawing. Appellant stated that under the agreement RSC would participate in any proceeds derived from

the lease.

Appellant also argued that because RSC had an interest in the lease, Coyer was required to file a statement telling of the additional party in interest as required by 43 CFR 3102.7.[2]

The State Office was very familiar with the terms of the RSC service agreement, having challenged that same agreement in a previous simultaneous oil and gas filing. That case had been taken on appeal to this office in Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148 (1977). The State Office noted in its dismissal of the protest that Fred Engle, d/b/a Resource Service Company (RSC), in order to protect his clients during the consideration of that appeal, had submitted an amendment and disclaimer dated January 13, 1977. He waived all rights to an exclusive agency and agreed not to enforce the objectionable portions of the service agreement calling for a percentage commission on all lease

sales and royalties benefiting his clients. Subsequently, Engle notified all of his clients who were winners in the simultaneous drawings that they were not bound by the objectionable provisions of the original service agreement. Therefore, the State Office treated the objectionable provisions as if they had no effect because they would not be enforced by RSC.

When Coyer was notified by RSC that he was the winner for parcel No. 44, he chose to execute a new agreement with RSC containing similar language as that of the original agreement. The State Office found that the execution of the new agreement after the drawing did not violate 43 CFR 3102.7 because the lessee was free to develop or assign the lease as he deemed best without interference.

Appellant objects to the State Office decision stating that it ignores the language of 43 CFR 3102.7 and 3100.0-5(b). He contends

the service agreement created an interest in RSC in the subsequent lease which required a filing as to parties in interest in compliance with 43 CFR 3102.7. It is his position that the conditional disclaimer filed by RSC, which is not communicated to the winner until after the drawing, did not relieve the lessee of the filing requirement. Such a disclaimer changed nothing as to the preexisting arrangement which he asserts remained in effect at the time of the drawing.

[1] As indicated by both the State Office and appellant, the exact language of the service agreement used by RSC and as executed by the parties in this case has been examined at length by this Board in Sidney Schreter, William Wopp, Jr., supra. [3] We found that the agreement provides RSC with more than a mere hope or expectation of sharing in the profits. RSC has an enforceable right by the terms of the agency provision of the agreement to share in

the profits of any sublease, assignment, or sale of a lease, whether such sublease, assignment, or sale is negotiated by RSC or by the offeror. In addition, such a right is enforceable for a period of 5 years.

Since RSC has a prospective claim to a benefit from a lease, the service agreement provides RSC with a defined share of any profits which may be derived from the lease pursuant to the agreement which was in existence at the time the offer was filed. Therefore, we concluded in Schreter that the agreement created an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

However, the current case presents a different situation for our consideration, where during the pendancy of the Schreter appeal, RSC filed an amendment and disclaimer with the Wyoming State Office, BLM, January 13, 1977.

Under the terms of that document if it is ultimately determined by the Department and the courts that this service agreement vests an interest in the lease or offer to lease in RSC, Fred Engle, d/b/a Resource Service Company, proclaims:

> I,***do hereby state and aver that I do hereby waive and renounce any exclusive agency which I may have by reason of said service agreements with said offerors from and after this date. ***I do hereby further state and aver that said waiver and renunciation shall become operative forthwith and shall inure forthwith for the benefit of all said offerors.

[2] From our review of the sequence of events which culminated in the May drawing for parcel No. 44, we do not find that Engle's filing of his waiver document with the Wyoming State Office effectively amended the service agreement with Coyer.

Engle's unilateral action did not alter the contractual obligations of the parties as they existed as of the date of the drawing. First, the waiver document was not communicated to Coyer until after

the drawing, and a new agreement was not ratified by Coyer until after he was declared the winner for parcel No. 44. The waiver served notice to the BLM that RSC did not intend to enforce the objectionable provisions of the service agreement. However, without notice to, or an agreement with Coyer, Engle was not bound to carry out the terms of the alleged amendment. It is fundamental to the formation of a contract that there be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract. For both parties to be bound to an agreement there must be a distinct and common intention which is communicated by each party to the other. 17 Am. Jur. 2d, Contracts §18 (1964). That element is obviously lacking here.

Next, there was no consideration given to Engle by his client for his forbearance from enforcing his contractual rights. It is a fundamental legal requisite for the formation of an enforceable contract

that legally sufficient consideration be given for a promise. A promise has no consideration when nothing was in fact given in exchange for the promise or when no action was taken in reliance upon it, either because the promise was intended as a gratuity or because the thing for which it was offered was not given. Williston on Contracts, Third Edition Section 101; 17 Am. Jur. 2d, Contracts §85. For these reasons we find Engle's waiver was without effect as a matter of law. The original service agreement remained in effect as of the date of the drawing giving RSC an interest in the lease as defined by 43 CFR 3100.0-5(b). Therefore, we hold that Coyer, as a successful drawee, was required to make a timely showing as to RSC's interest under 43 CFR 3102.7.

Appellant has also provided evidence that RSC may have represented some 200 other client-offerors in this drawing for

parcel No. 44. Since we find that Engle's amendment and waiver were ineffective, it then follows that any other offerors availing themselves of RSC's services in the drawing would have remained bound by their original service agreements with RSC in a like manner. Engle did gain an increased probability of success in the drawing. Accordingly, the regulation prohibiting multiple filings, 43 CFR 3112.5-2, has also been violated.

[3] As for the execution of the new agreement by the parties with the same terms after the drawing, such actions were of no consequence. The facts show that by letter of May 9, 1977, Engle notified Coyer that he was the winner and explained the question raised by the BLM concerning the binding effect of the service agreement and requested Coyer to reestablish their mutual interest relationship. Coyer signed the new agreement the same date. However, the parties cannot retroactively cure the

defect after they knew that the offer was the first own drawn for the parcel.

The Board has repeatedly held that the requirements of 43 CFR 3102.7 are mandatory and that an offer not in compliance therewith must be rejected. Emily Sonnek, 21 IBLA 245 (1975); Joy Goodale, 18 IBLA 38 (1974); Wesley Warnock, 17 IBLA 338 (1974); Mary West, 17 IBLA 84 (1974); D. O. Keon, 17 IBLA 81 (1974). A first-drawn simultaneous drawing entry card which is defective because of non-compliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information. Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, B.E.S.T., Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed

and remanded for action consistent herewith.

/s/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

We concur:

/s/ Frederick Fishman
Frederick Fishman
Administrative Judge

/s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

Footnotes:

1. 43 C.F.R. 3112.5-2 Multiple filings, provides:

When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to §3110.1-6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from

such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bona fide purchaser as provided for in §3102.1-2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued."

2. 43 CFR 3102.7 Showing as to sole party in interest, provides:

"A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's

rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is canceled."

3. The critical section of the agreement provides:

"If I am successful in a drawing, I hereby authorize you to act as my sole and exclusive agent to negotiate for me and on my behalf with any party, firm or corporation for sub-lease, assignment or sale of any rights I obtain by reason of being successful in a drawing for the best price obtainable by you. Any final negotiated price is subject to my approval. If you have successfully negotiated a sale, assignment or lease of my rights by reason of a successful drawing or if I do so during the term of this agency, I hereby agree to pay you for your services in accordance with the schedule detailed below. This agency to negotiate shall be valid for a period of five (5) years." [Emphasis in original.]

OPINION OF INTERIOR BOARD OF LAND APPEALS IN COYER V. EASTERDAY, 36 I.B.L.A. 181 (1978)

DONALD W. COYER, APPELLANT
ALFRED L. EASTERDAY, APPELLEE

IBLA 78-409 - Decided July 31, 1978

Appeal from the rejection of appellant's oil and gas lease offer. W-59232.

Dismissed.

1. Administrative Procedure: Administrative Review--Appeals--Res Judicata--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Dismissal

Where the Board of Land Appeals has considered an appeal and rendered a final decision holding that a particular oil and gas lease offer was not proper and must be rejected, the applicant may not thereafter appeal the matter to this Board merely because the Bureau of Land Management,

in implementing the Board's decision, mistakenly advised him that he had the right to such an appeal. The matter is res judicata, and the subsequent appeal must be dismissed.

2. Administrative Procedure: Administrative review--Administrative Procedure: Judicial Review--Appeals-- Judicial Review--Rules of Practice: Appeals: Generally

Where the Board of Land Appeals, by a previous decision, has held that a particular oil and gas lease offer must be rejected, and the rejected applicant files suit for judicial review of that decision in the United States District Court, and also files a contemporaneous appeal to the Board from a BLM decision im-

plementing the Board's decision, the Board will defer to the Court's jurisdiction and make no decision on the merits of the appeal, which is subject to summary dismissal by the Board.

APPEARANCES: Matthew J. Flynn, Esq., Milwaukee, Wisconsin, and Jerry Statkus, Esq., Cheyenne, Wyoming, for the appellant; Morton J. Schmidt, Esq., Milwaukee, Wisconsin, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In April 1977, the Wyoming State Office of the Bureau of Land Management conducted its regular monthly drawing of simultaneously filed oil and gas lease offers. The drawing entry card offer of Donald W. Coyer was drawn first for Parcel No. Wy-44, and the card filed by Alfred L. Easterday was drawn second. Easterday protested the issuance of the lease to Coyer, contending that Coyer's agreement

with his leasing service (Resource Service Company) invested the leasing service with an undisclosed interest in the offer and the lease if issued. The Wyoming State Office dismissed Easterday's protest, whereupon he filed an appeal to this Board. The decision of the Wyoming State Office named Coyer as an adverse party, and Coyer was served copies of all documents filed in connection with Easterday's appeal.

By our decision dated March 22, 1978, this Board held that the leasing service did indeed have an undisclosed interest in Coyer's offer, and that the company's alleged "waiver" of that interest was ineffective, so that Coyer's offer was violative of 43 CFR 3102.7 and 43 CFR 3112.5-2. The Board remanded the case to the Wyoming State Office for further action consistent with that opinion. Alfred L. Easterday, 34 IBLA 195 (1978).

In an effort to implement the Board's decision in Easterday, supra, the Wyoming

State Office rejected Coyer's lease offer by its letter decision dated April 10, 1978. However, in so doing, the Wyoming State Office advised Coyer that he had a right to appeal from that decision to this Board, in which event the adverse party to be served would be Easterday. This advice is in error, as will be explained.[1]

Coyer then filed this appeal. On June 20, 1978, Coyer and one Fred L. Engle, d/b/a Resource Services Company, filed suit in the United States District Court for the District of Wyoming, seeking judicial review of this Board's decision in Alfred L. Easterday, supra. Coyer v. Andrus, Civ. No. C 78-104.

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1 BLM Manual sec. 1841.1 (Rel. 1-920, 7/15/74) provides in part: ".15 The Right of Appeal. Parties to BLM decisions either have or do not have the right of appeal by regulation. (See 43 CFR 4.410.) Therefore, a decision may neither grant the right where it does not exist nor withhold it where it does exist." (Emphasis added.)

In response to Coyer's appeal to this Board, Easterday moved that it be summarily dismissed, asserting that this Board's decision in Easterday had made the matter res judicata.

[1] Coyer's appeal is, in effect, an appeal of the decision of this Board in Easterday, involving the same parties, the same events, the same lease, and is before the same tribunal. Although it purports to be an appeal from the action of the Wyoming State Office in rejecting Coyer's lease offer, that action was merely the ministerial implementation of the Easterday decision, and carried no right of appeal to the Board. The decision of this Board is final for the Department, and no further appeal will lie in the Department. 43 CFR 4.21(c). Where an appeal has been taken and a final departmental decision has been reached, under the doctrine of administrative finality

the principle of res judicata will operate to bar consideration of a new appeal arising from a later proceeding involving the same parties, the same land and the same issues. Dallas C. Qualman, ___ IBLA ___ (1978); Pekka K. Merkallio, 30 IBLA 157 (1977); United States v. Blythe, 16 IBLA 94 (1974), aff'd Blythe v. Kleppe, Civ. No. 77-1446 (10th Cir., filed Nov. 16, 1977); Elsie Farrington, 9 IBLA 191 (1975), aff'd Farrington v. Morton, Civ. No. S-2768 (D. Calif., filed Dec. 15, 1973); Eldon L. Smith, 6 IBLA 310 (1972); Eldon L. Smith, 5 IBLA 330, 79 I.D. 149 (1972); The Dredge Corporation, 3 IBLA 98 (1971); Gabbs Exploration Co., 67 I.D. 160 (1960), aff'd, Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963), cert den. 375 U.S. 822 (1963).

This appeal is clearly a manifestation of a case barred by the principle of res judicata, and must be dismissed for that reason.

[2] There is, however, yet another basis for the dismissal of this appeal. Appellant's filing of a suit for judicial review of our previous decision in this matter contemporaneous with his filing of his appeal to this Board has placed the matter before two tribunals, administrative and judicial. In past cases such as this, where matters pending before the Department have been submitted to a court of law, the Department has customarily deferred to the jurisdiction of the court. In such case the administrative appeal may be suspended to await the court's disposition of the case, or the administrative appeal may be dismissed, as indicated by the circumstances. In Carl Alber, A-30369 (May 25, 1967), the Department held:

> Where a decision of the Director, Bureau of Land Management, is put into full force and effect pending a decision on any appeal from the decision, the appellant files an appeal to the Secretary and then brings an action in court to review the Director's

decision, his appeal will be regarded as withdrawn or abandoned and will be dismissed.

In light of our holding that Coyer's appeal is barred by the doctrine of res judicata, his filing of an action to litigate the same issues in the United States District Court impels the dismissal of this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is hereby dismissed. The administrative record will be returned to the Wyoming State Office, so as to be available for use in the litigation.

/s/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

We concur:

/s/ Frederick Fishman
Frederick Fishman
Administrative Judge

/s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

ORDER OF U.S. DISTRICT COURT IN COYER V. ANDRUS, D.WYO.CIV.NO. C-78-104K (1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DONALD W. COYER, and FRED L. ENGLE d/b/a RESOURCE SERVICE COMPANY,

Plaintiffs,

vs.

CECIL D. ANDRUS, Secretary of the Interior, United States Department of the Interior; and ALFRED L. EASTERDAY, and J. ROE,

Defendants.

ORDER REMANDING APPEAL
TO WYOMING STATE OFFICE

No. C78-104K

[Filed February 1, 1979]

The above-entitled matter coming on regularly for hearing before the Court upon an appeal from the Interior Board of Land Appeals, plaintiffs appearing by and through their respective counsel of record and the defendants appearing by and through their respective counsel of record, and the Court having considered

the argument of counsel and having fully and carefully reviewed the record on appeal, finds the following facts are not in dispute: plaintiff Coyer has an agreement with a leasing service known as Fred L. Engle, d/b/a Resource Service Company; the agreement creates an undisclosed interest violative of the regulations (Lola I. Doe, 31 IBLA 394, August 19, 1977 and Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148, September 12, 1977); following these decisions Engle filed a disclaimer with the Wyoming State Office stating that any of his clients who might be awarded a lease would not be bound by the invalid agreement; the Wyoming State Office treated the objectionable parts of the agreement as if they had no effect.

Coyer was awarded the lease by the Wyoming State Office; Easterday protested; his protest was dismissed by the Wyoming State Office; Easterday appealed to the IBLA; the IBLA reversed the decision of

the Wyoming State Office, finding that the alleged disclaimer was without effect to bind the parties to it and remanded it to the Wyoming State Office; Coyer failed to appear or submit briefs on the appeal.

Following the above actions, the Wyoming State Office rejected Coyer's priority status and awarded the lease to Easterday; Coyer was advised of his right of appeal to the IBLA; Coyer appealed to IBLA and his appeal was dismissed as being res judicata in the light of the earlier Easterday appeal and decision.

Coyer instituted the present action in this Court for injunctive and declaratory relief, alleging arbitrary and capricious action on the part of the Secretary.

Defendant Andrus filed a Motion to Dismiss, said motion having been argued before the Court; later, Coyer's attorney contended he had not received notice of the hearing on the Motion to Dismiss; Andrus contends this Court is without jurisdiction

and the plaintiff has failed to state a claim.

Geosearch filed a Motion to Intervene as Defendant claiming it acquired twenty-five per cent (25%) interest in Easterday's lease.

Taking the record as a whole, this Court finds the record is in such a state of confusion that an intelligent review is not possible, and the Court being fully advised in the premises; it is

ORDERED that said matter be remanded to the Wyoming State Office where each of the parties will be given a full opportunity to appear in person and present such evidence as may be relevant to the interest of each.

Dated this 12th day of February, 1979.

/s/ Ewing T. Kerr
U. S. District Judge

OPINION OF INTERIOR BOARD OF LAND APPEALS
IN DONALD W. COYER, 50 I.B.L.A. 306 (1980)

DONALD W. COYER, FRED L. ENGLE,
D.B.A. RESOURCE SERVICE CO., INC.,
APPELLANTS;
ALFRED L. EASTERDAY,
BUREAU OF LAND MANAGEMENT,
RESPONDENTS
(ON JUDICIAL REMAND)

IBLA 78-73, 78-409

Decided October 14, 1980

Proceeding on remand from the U.S. District Court for the District of Wyoming, following hearing and issuance of proposed findings and conclusions by Administrative Law Judge Robert W. Mesch, concerning oil and gas lease offer W-58232.

Proposed findings and conclusions adopted; Donald W. Coyer, 36 IBLA 181 (1978), and Alfred L. Easterday, 34 IBLA 195 (1978), reaffirmed.

1. Administrative Procedure: Administrative Review--Appeals--Res Judicata--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Dismissal

Where an individual is named as an "adverse party" in a BLM decision which is favorable to that person, who then is duly served with copies of a notice of appeal and statement of reasons challenging the validity of BLM's decision before the Board of Land Appeals and seeking reversal of that decision, but decides not to participate in the appellate proceedings before the Board, the matter becomes res judicata upon the rendering of the Board's decision, and the party may not subsequently challenge this decision by filing a new appeal of his own before the Board for readjudication of the same matter.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases:

First Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and any payments of overriding royalties retained. Such an agreement creates for the leasing service

an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

3. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Sole Party in Interest--Oil and Gas Leases: First Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service fileds a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such waiver to the client, and without any contractural consideration running from the client to the leasing service, the "waiver"

is without effect as a matter of law and the successful drawee is required to make a showing as to sole party in interest under 43 CFR 3102.7.

4. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Filing

Where an oil and gas leasing service has an interest in the offers of its clients, and where it files offers for multiple clients on one particular parcel, the service has increased the probability of its success in the drawing, and all of its clients' offers for that parcel must be rejected under 43 CFR 3112.5-2.

5. Equitable Adjudication: Generally --Estoppel--Federal Employees and Officers: Authority to Bind Government--Oil and Gas

Leases: Applications: Generally

The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by a State Office of BLM, of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM State Office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.

Appearances: Thomas W. Ehrmann, Esq., Milwaukee, Wisconsin, for appellants; Morton J. Schmidt, Esq., Milwaukee, Wisconsin, for respondent Alfred L. Easterday; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for respondent Bureau of Land Management; Jason R. Warran, Esq., Washington, D.C., for amicus curiae

Eloise B. Miller.[1]

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In Alfred L. Easterday, 34 IBLA 195 (March 22, 1978), this Board reversed a decision by the Wyoming State Office, Bureau of Land Management (BLM), which had denied the protest of Easterday[2] against the first-drawn simultaneous oil and gas lease offer of Donald W. Coyer, W-59232. We held that Fred Engle, d.b.a. Resource Service Co., Inc. (RSC), had an undisclosed interest in Coyer's offer when it was filed with BLM, in violation of 43 CFR 3102.7,[3] and that Engle probably had an increased probability of participating in the proceeds from the lease owing to his having a similar interest in other offers filed for the same parcel by some 200 more of his clients, in violation of 43 CFR 3112.5-2.[4]

Engle's interest was created by the service agreement contract between him and each of his clients, including Coyer. This agreement authorized Engle to act

as the client/offeror's exclusive agent for 5 years to negotiate assignment or sale of all oil and gas rights won by the client, and provided that Engle would receive a share of the proceeds of any such sale, whether or not arranged by him, as well as a share of and payments of overriding royalty retained by the client. We held in Easterday, supra, as we had held previously in Sidney Schreter, 32 IBLA 148 (1977), that this agreement gave Engle an enforceable right to a defined share of the proceeds of the lease, an "interest" as defined by 43 CFR 3100.0-5(b).

In Easterday, supra, we also held that Engle's purported "amendment and disclaimer" of this interest was a unilateral action which was not communicated to his clients and for which no consideration was received. As such, we held, it was unenforceable and therefore ineffective to vitiate Engle's interest in Coyer's offer and in the offers of his other clients which were filed on this parcel.

Coyer was named as an adverse party by BLM in its original decision denying Easterday's protest, and he was therefore served with a copy of Easterday's notice of appeal and statement of reasons before this Board. However, he elected not to participate by filing an answer, or any other form of response. As, under our rules of procedure, the failure of an adverse party to respond to an appeal does not constitute a default, the Board proceeded to render a decision on the merits reversing BLM's decision and remanding the case for further action.

In implementing our decision in Easterday, BLM rejected Coyer's offer on April 10, 1978. Coyer then filed an appeal of that action with this Board and contemporaneously filed in the U.S. District Court for the District of Wyoming a petition for judicial review of the Easterday decision. We dismissed Coyer's appeal in Donald M. Coyer, 36 IBLA 181 (July 31, 1978), holding that, as the matter involved the identical

issues, land, and parties as in Easterday, the doctrines of administrative finality and res judicata barred our adjudicating it again. We also held that our further consideration of the matter was impaired in any event by Coyer's filing his contemporaneous lawsuit with the District Court.

As the matter was before the District Court, after rendering the Coyer decision we certified the administrative record and forwarded it to BLM, which received it on August 21, 1978. At some point thereafter, the case file was misplaced and could not be presented to the District Court for review. On February 12, 1979, the Court issued an order noting that "the record is in such a state of confusion that an intelligent review is not possible," and remanding the matter to give the parties a full opportunity to present such evidence as may be relevant to their interest.

The District Court's order of February 12, 1979, remanded the matter to the Wyoming State Office, BLM, for this hearing.

However, as BLM is neither staffed with any designated hearing officers who could properly conduct the sort of evidentiary proceeding contemplated by the Court, nor empowered to make findings or conclusions contrary to final decisions of the Board, and because it was the Board's decisions (not BLM's) which were at issue, on June 19, 1979, we issued an order referring the matter to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge to conduct a full evidentiary hearing, with proposed findings and conclusions to be submitted to the Board for review. On August 31, 1979, the District Court expressly affirmed this action by amending its order of February 12, nunc pro tunc, to remand the matter to the Hearings Division as provided in our June 19 order. Judge Kerr noted that the Administrative Law Judge should resolve issues relating to the lost administrative record and make provision for the authentication of a reconstructed record.

On September 10, 1979, Administrative Law Judge Robert W. Mesch directed the parties to file statements detailing the issues presented, and schedule a prehearing conference, which was held on October 12, 1979, in Cheyenne, Wyoming.[5] Subsequently, the parties clarified the matters in issue and began their effort to reconstruct the administrative record.

The hearing before Judge Mesch was held on February 14, 1980, in Denver, Colorado. At this hearing, BLM introduced into evidence the misplaced administrative record concerning this lease offer, containing the official, original record up to the time it was certified by the Board. We have scrutinized this record and found that it is the complete, original file, and that nothing has been added to it.

Following his consideration of the administrative record, and the other evidence adduced at the hearing, Judge Mesch issued Proposed Findings and Conclusions on July 14, 1980, and submitted them,

along with the case record, to this Board. We have reviewed these findings and concluded that they should be adopted in full.

[1] Engle's and Coyer's effort to appeal the rejection of Coyer's offer pursuant to this Board's decision in Easterday was barred by his failure to participate in the review procedure when this matter was properly before the Board. Coyer was named as an "adverse party" in BLM's dicision rejecting Easterday's protest. As such, he was entitled to receive copies of any notice of appeal and supporting statement of reasons filed by Easterday, in order to allow him the opportunity to defend his interests by filing an answer to this appeal. 43 CFR 4.413, 414. The record shows that Easterday served these documents on Coyer as required, and Engle and Coyer knew that the validity of Coyer's offer was being litigated before the Board pursuant to Easterday's appeal. Before Judge Mesch, Engle and Coyer admitted that they knew so, explaining that they deliberately did not participate

because they were sure that they would prevail on appeal (Pr. Find. & Concl. at 10-11). Had Engle and Coyer simply filed an answer to Easterday's appeal, they would have been entitled to participate in the proceeding with full status as parties, including the right to request an evidentiary hearing per 43 CFR 4.415. However, having failed to participate in Easterday's appeal, Coyer may not attack the results of this appeal by filing a new appeal of his own to this Board, as the matter is res judicata. Donald W. Coyer, supra.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Construction and Mining Co., 384 U.S. 394, 433 (1966). It is appropriate to apply res judicata to bar a suit for judi-

cial review of an agency decision by the affected person, where he has been given an opportunity to challenge the decision within the agency's appellate framework but has elected not to exercise this opportunity by taking an appeal. A. Duda & Sons Cooperative Ass'n. v. United States, 495 F.2d 193 (5th Cir. 1974); see Leviner v. Richardson, 443 F.2d 1338 (4th Cir. 1971). Coyer and Engle were given the opportunity to litigate the validity of Coyer's offer by participating in the quasi-judicial appellate proceeding initiated by Easterday, and knowingly and deliberately elected to forego this right, thus rendering our decision in Easterday final and barring a collateral attack on its efficacy.[6]

[2, 3, 4] In any event, Coyer's and Engle's attack on the validity of our decision in Easterday fails on its merits. The service agreement between them gave Engle an "interest" in Coyer's offer.[7] This interest was not abrogated

by Engle's subsequent attempt to unilaterally disclaim it, as Engle did not communicate this putative waiver to Easterday or receive any consideration from him to bind the contract.[8] Coyer failed to disclose this interest at the time the offer was made as required by 43 CFR 3102.7, and his offer must therefore be rejected because it violates this regulation.[9] Moreover, numerous other offers in which Engle had a similar interest were apparently filed for this parcel, thus increasing Engle's chances of success in violation of 43 CFR 3112.5-2, under which all such offers, including Coyer's, must be rejected.[10]

[5] Finally, the Department is not estopped from rejecting Coyer's offer on account of the "understanding" between Engle and employees of the Wyoming State Office in connection with the filing of the putative waiver. The Departmental regulation is explicit on this question: "The United States is not bound or estopped

by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." 43 CFR 1810.3(b). It is this Board, as the representative of the Secretary of the Interior, which decides what Departmental regulations and other provisions of law sanction or permit as fully and finally as might the Secretary himself, in Departmental disputes concerning the public lands. 43 CFR 4.1(b)(3). Thus, when a representative of BLM enters into any agreement, it is subject to review by the Secretary, through this Board, and, if improper, it is without effect, regardless of whether or not a party may have relied on the forming of the agreement. To allow subordinate officials to enter into binding agreements would empower them to take actions immune from review by the Department and would effectively undermine the supervisory power of the Secretary to make and enforce policy in

the Department, or to correct the errors of subordinates. This principle is in accord with judicial determinations regarding estoppel, which require, inter alia, that the party seeking estoppel must have had a reasonable right to rely on a misrepresentation by Government agents.[11] As the regulation (id.) so states unequivocally, it is a matter of record that BLM State officials do not have final authority in the Department, and that, to the contrary, their rulings are subject to protest and appeal procedures. As all citizens are charged with the responsibility of being familiar with applicable regulations (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)), Engle had constructive notice that BLM's accomodation did not bind the Department.

Furthermore, Judge Mesch has found that Engle had actual knowledge that the Wyoming State Office, BLM, could not speak for the Department.[12] Thus, it is clear that Engle could not reasonably have relied

in good faith on the finality of the arrangement made with the Wyoming State Office. Rather, Engle knew (and the regulation made clear) that BLM's decision to accept the disclaimer was subject to protest and review at the Secretarial level, which review might result in reversal of this decision.

Accordingly, we find that the Department is not estopped to reject Coyer's lease offer.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are sustained.

/s/Edward W. Stuebing
Administrative Judge

We concur:

/s/Douglas E. Henriques
Administrative Judge

/s/Frederick Fishman
Administrative Judge

FOOTNOTES:

1 Coyer and Engle were the respondents in Alfred L. Easterday, 34 IBLA 195 (1978), and the appellants in Donald W. Coyer, 36 IBLA 181 (1978). As the parties seeking review, they are properly described as appellants herein. Easterday was the appellant in Alfred L. Easterday, supra at n.1, and the respondent in Donald W. Coyer, supra at n.1. Schmidt also apparently represents whatever interest is held by Geosearch, Inc., in this matter. (See infra at n.5.) By order dated October 22, 1979, Administrative Law Judge Mesch granted Miller leave to participate as amicus curiae, as she is involved in a different dispute involving similar issues.

2 Easterday was the offeror whose drawing entry card was drawn with second priority in the May 1977 drawing for this parcel, designated as WY-44, in the Wyoming State Office, Bureau of Land Management (BLM).

3 43 CFR 3102.7 provides as follows:

"Showing as to sole party in interest.

"A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited

in the U.S. Treasury and will not be returnable even though the lease is canceled."

4 43 CFR 3112.5-2 provides as follows:
"Multiple filings.
"When any person, association, corporation or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to §3110.1-6(b), all offers filed by either party will be rejected."

5 Although Geosearch, Inc., never petitioned to intervene in the administrative proceedings concerning this lease offer, it nevertheless filed a prehearing statement with Judge Mesch. Geosearch had petitioned to intervene in the judicial proceedings in the District Court, asserting that it had acquired a 25 percent interest in Easterday's offer. However, this assertion was never proven, as the Court remanded the matter without ruling on Geosearch's petition. At the prehearing conference, Morton J. Schmidt, Esq., counsel for respondent Easterday indicated that he was authorized to represent whatever interest Geosearch might have (Prehearing Conf. Tr. 3-5). Accordingly, we recognize Schmidt in this capacity without finding that Geosearch has any cognizable interest in this lease offer.

6 Moreover, Engle has also had a full opportunity to litigate the same issues presented in this case in a separate administrative proceeding concerning the

offer of Frederick W. Lowey, another of his clients, which was filed in the New Mexico State Office, BLM. Lowey's appeal, in which Engle appeared as a party, raised the same issues as did Coyer's and was decided against him. Thus, Engle is involved in his third opportunity to litigate these same issues before the Board.

7 Pr. Finds. & Concls. at 4; 43 CFR 3100.0-5(b); Frederick W. Lowey, 40 IBLA 381, 383 (1979); Alfred L. Easterday, supra at 198; Sidney H. Schreter, 32 IBLA 148 (1977); Lola I. Doe, 31 IBLA 394 (1977); see also Order Remanding Appeal to Wyoming State Office, Coyer v. Andrus, No. C78-104K (D. Wyo. Feb. 12, 1979), containing the finding that the following facts are not in dispute: "Coyer has an agreement with a leasing service known as Fred L. Engle, d/b/a Resource Service Company; the agreement creates an undisclosed interest violative of the regulations (Lola Doe, 31 IBLA 394, August 19, 1977 and Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148, September 12, 1977)."

8 Pr. Finds. & Concls. at 4-5; Frederick W. Lowey, Supra at 199.

9 Pr. Finds. & Concls. at 6; Frederick W. Lowey, supra at 384-392; Alfred L. Easterday, supra at 199; see also District Court's order of Feb. 12, 1979, quoted above at n.7.

10 Pr. Finds & Concls. at 12-13; Alfred L. Easterday, supra at 200.

11 An analysis of the operation of estoppel against the Government is contained in the judicial opinions delivered in the cases of United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975);

United States v. Lazy FC Ranch, 324 F. Supp 698 (D. Idaho 1971), Aff'd, 481 F.2d 985 (9th Cir. 1973); and United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). Under these holdings, in order for estoppel to lie against the Government, inter alia, the individual asserting estoppel must have relied to his detriment on misinformation received on account of some affirmative misconduct by Government agents acting within the scope of their authority, on which misinformation the party had a reasonable right to rely. United States v. Joseph Larsen, 36 IBLA 130 (1978).

12 Judge Mesch found that Engle's "amendment and disclaimer" itself contains recitals demonstrating that Engle clearly recognized that the Wyoming State Office did not speak for the Department, which recitals belie Engle's assertions to the contrary (Pr. Finds. & Concls. at 7).

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

July 14, 1980

PROPOSED FINDINGS AND CONCLUSIONS

Donald W. Coyer and
Fred L. Engle, d/b/a
Resource Service Company,

Appellants

v.

Bureau of Land Management and
Alfred L. Easterday,

Respondents

IBLA 78-73 34 IBLA 195

IBLA 78-409 36 IBLA 181

Oil and Gas Lease
Proceeding on Remand

Appearances: Thomas W. Ehrmann, Wayne E. Babler, Jr., Ross R. Kinney and William R. Hamm of Quarles & Brady, Milwaukee, Wisconsin, for appellants;

Harold J. Baer, Jr., Office of the Solicitor, Department of the Interior, Denver, Colorado, for respondent, Bureau of Land Management;

Morton J. Schmidt of Morton J. Schmidt & Associates, Ltd., Milwaukee, Wisconsin,

for respondent Alfred L. Easterday; Jason R. Warran of McDade and Lee, Washington D.C., for amicus curiae, Eloise B. Miller;

Before: Administrative Law Judge Mesch.

In May, 1977, the Wyoming State Office of the Bureau of Land Management conducted its regular monthly drawing of simultaneously filed oil and gas lease offers. The drawing entry card offer of Donald W. Coyer was drawn first for parcel No. 44, and the card filed by Alfred L. Easterday was drawn second. As a result of the drawing, Coyer was entitled to receive a lease, W 59232, covering parcel No. 44 if he was a qualified offeror.

Easterday filed a protest with the Wyoming State Office against the issuance of the lease to Coyer. Easterday contended that Coyer was not a qualified offeror because he had an agreement with a leasing service operated by Fred L. Engle, doing business as Resource Service Company, that invested Engle with an undisclosed

interest in the offer and the lease if issued.

By a decision dated October 25, 1977, the Wyoming State Office dismissed Easterday's protest. In its decision, the Wyoming State Office recognized that there was a service agreement between Coyer and Engle that created an undisclosed interest in Engle in Coyer's offer. The decision concluded, however, that the objectionable provisions of the service agreement were of no effect because Engle had submitted an amendment and disclaimer document by which he waived, and agreed he would not enforce, his rights under the service agreement.

Easterday appealed to the Interior Board of Land Appeals. Coyer did not participate in the proceedings on appeal. In Alfred L. Easterday 34 IBLA 195 (March 22, 1978), the Board held (1) that Engle's service agreement gave Engle an interest in Coyer's offer within the meaning of 43 CFR 3100.0-5(b) because he had an enforceable right to share in the profits

of any sale of any lease obtained by Coyer; (2) that Engle's amendment and disclaimer document was ineffective as a matter of law because there was no notice to or agreement with Coyer prior to the drawing and there was no consideration given to Engle for his forebearance from enforcing his contractual rights; (3) that Coyer's offer violated 43 CFR 3102.7, which required a timely disclosure of Engle's interest in the offer; and (4) that there was a violation of 43 CFR 3112.5-2, which prohibits multiple filings, because Engle may have represented some 200 other client-offerors under similar service agreements in the drawing for parcel No. 44.

On April 10, 1978, the Wyoming State Office issued a decision rejecting Coyer's lease offer. Coyer filed an appeal to the Board of Land Appeals. Easterday participated in the proceedings on appeal. In Coyer v. Easterday, 36 IBLA 181 (July 31, 1978), the Board dismissed Coyer's appeal on the ground of Res Judicata

stating, "Coyer's appeal is, in effect, an appeal of the decision of this Board in Easterday, involving the same parties, the same events, the same lease, and is before the same tribunal".

Coyer and Engle sought judicial review of the Board's decisions. On February 12, 1979, the United States District Court for the District of Wyoming issued an order in Coyer, et al. v. Andrus, et al., Civil No. C 78-104, remanding the matter for a redetermination of the rights of the parties.

By an order dated June 19, 1979, the Board of Land Appeals referred the matter for assignment to an administrative law judge to "conduct a hearing pursuant to 43 CFR 4.415 for the reception of evidence on any relevant issues of disputed fact, and to hear all arguments of fact and law". The Board also directed the administrative law judge to make proposed findings and conclusions for submission to the Board in accordance with 43 CFR 4.433. In its

order, the Board stated that "the plaintiffs to the judicial litigation will be required to plead and prove reversible error in decisions rendered by this Board in disposing of the respective appeals of Easterday and Coyer".

A hearing was held on February 14, 1980, in Denver, Colorado. The parties and the amicus curiae have submitted proposed findings and conclusions and supporting briefs.

Coyer and Engle do not challenge the Board's determination that the service agreement used by Engle created an interest in Engle in Coyer's lease offer. They contend that Engle reached an agreement with personnel of the Wyoming State Office to the effect that Engle's amendment and disclaimer eradicated the prohibited interest from his service contracts, and the agreement with the State Office Employees should be given legal effect and enforced because (1) Federal regulatory policies will not be prejudiced and will actually be promoted by giving effect to

the agreement; (2) the regulations and adjudicatory precedents do not specify how forbidden interests can be eradicated and any reasonable means agreed to between the holders of the interest and a representative of the Bureau of Land Management should be enforced under established principles relating to (a) agreements made by governmental entities in carrying out proprietary functions, (b) equitable estoppel, (c) retroactive application of new legal rules, and (d) apparent authority of government representatives in the course of carrying out proprietary functions; and (3) the amendment and disclaimer method of eradicating the prohibited interest has a solid base in the common law doctrine of waiver.

Easterday and the Bureau dispute the claimed effect of Engle's amendment and disclaimer, the claimed effect of any agreement between Engle and employees of the Wyoming State Office, and the validity of the legal conclusions advanced by Coyer

and Engle. Among other things, they assert (1) that any agreement between Engle and employees of the Wyoming State Office cannot be given legal effect and enforced because this would permit employees of the state office to immunize a decision of that office from review by higher authority and effectively nullify Easterday's right to appeal the state office decision of October 25, 1977, which is granted by the Department under 43 CFR 4.410; (2) that Coyer and Engle are precluded from litigating any issues relating to any agreement between Engle and employees of the Wyoming State Office because Coyer had the opportunity and did not present such issues to the Board of Land Appeals on Easterday's appeal from the Wyoming State Office decision of October 25, 1977, and they cannot now present new theories designed to alter the results of the previous adjudication; (3) that Engle is precluded from litigating the effect of the amendment and disclaimer and any agreement reached with employees

of the Wyoming State Office because he has already litigated the issues in another case decided by the Board, i.e., Frederick W. Lowey, et al., 40 IBLA 381 (May 14, 1979); and (4) that Coyer and Engle have not shown reversible error in the decisions of the Board, as required by the Board's order for a hearing in this proceeding.

The history of this case, pertinent regulations, the relevant evidence presented at the hearing, and other matters either agreed to or undisputed are summarized in an attached appendix. That summary supports and dictates the following findings and conclusions:

1. The service agreement executed by Coyer on January 4, 1977, and used by Engle in filing Coyer's drawing entry card offer in the May 1977 drawing, authorized Engle to act, for a period of five years, as Coyer's sole and exclusive agent to negotiate the sale of any rights obtained by Coyer in the drawing. It further provided that, upon the consummation of a sale,

Engle would receive for his services a percentage of the cash price paid to Coyer and a percentage of any royalty payments made to Coyer. Under the service agreement, Engle had an interest in Coyer's offer as that term is defined in 43 CFR 3100.0-5(b) and illustrated in 43 CFR 3112.5-2.

By the amendment and disclaimer document executed by Engle on January 13, 1977, Engle waived and renounced, subject to a condition subsequent, the exclusive agency in his service agreements with his clients. Engle's attempt to amend, disclaim, waive or renounce the exclusive agency provisions of his service agreements would, if effective, have modified his contracts with his clients by eliminating (a) the authorization granted by his clients and Engle's obligation to act as their sole and exclusive agent in negotiating the sale of any rights obtained in a drawing; (b) the fixed percentage shares agreed upon for successfully negotiating a sale of any rights obtained in a drawing; and (c) Engle's

obligation, if the client did not receive at least $10,000.00 for the sale of any rights, to process up to 300 additional lease applications for the client without any service fees.

3. Engle's conditional amendment, disclaimer, waiver or renunciation was not communicated to Coyer prior to the May 1977 drawing. There was no mutual assent or meeting of the minds between Engle and Coyer prior to the drawing relating to Engle's attempted modification of his service agreement with Coyer.

There was no consideration to support the attempted modification of the contract. Engle's unilateral attempt to modify his contract with Coyer was ineffective as a matter of fundamental contract law. 17 Am. Jur. 2d, Contracts §465. Accordingly, Engle's amendment and disclaimer did not eradicate the interest he held in Coyer's offer at the time of the drawing.

4. In January of 1977, Engle and his then attorney reached an understanding

with employees of the Wyoming State Office under which the employees of that office agreed, insofar as that office was concerned and during an interim appeal period only, to (a) accept the amendment and disclaimer procedure proposed by Engle and his attorney as effectively eradicating the interests held by Engle in his clients' lease offers under his service agreements; and (b) take no action on their own initiative, if agreed procedures were followed, in rejecting any of Engle's clients' offers. No legal theory has been presented, and none is apparent, that would support the conclusion that Engle's agreement with employees of the Wyoming State Office supplied the legal deficiencies in Engle's unilateral attempt to modify his service contracts with his clients and, as a result, rendered the amendment and disclaimer effective as a modification of the basis provisions of the service agreements. The understanding or agreement reachec between Engle and employees of the Wyoming State Office did

in Coyer's offer.

5. The Department of the Interior follows specific adjudication and appellate procedures in its administration of the public lands. Each state office of the Bureau of Land Management makes the initial determination with respect to lands within its area of jurisdiction. Any party who is adversely affected by a decision of an officer of the Bureau of Land Management has an absolute right of appeal to the Board of Land Appeals. 43 CFR 4.410. The "Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources". 43 CFR 4.1(b)(3). Employees of a state office of the Bureau cannot effectively prejudge a case by agreement or otherwise and thereby immunize a decision of that office from independent review by the Board. The agreement reached between Engle and employees of the Wyoming State Office and

any representations made by those employees as to the action they would take with respect to offers filed by Engle under his service agreement and the amendment and disclaimer document were not binding on and had no legal effect insofar as the Board of Land Appeals is concerned. Easterday, as a party adversely affected by the decision of the Wyoming State Office in rejecting his protest to the issuance of a lease to Coyer, had the right of appeal and the right to have the Board consider the case on its merits free from any legal conclusions reached by employees of the Wyoming State Office. Engle and his attorney knew or should have known, of the established adjudication and appellate procedures followed by the Department.

6. There was a violation of 43 CFR 3102.7 because Engle's interest in Coyer's lease offer arising from his service agreement with Coyer was not disclosed to the Wyoming State Office and the required documents and signatures of Engle and Coyer were

not filed with that office.

7. There is no merit to the appellants' argument that the amendment and disclaimer procedure proposed by Engle and his attorney, and the agreement reached with employees of the Wyoming State Office pursuant thereto, should as a matter of Federal policy be held to have the intended effect because Federal regulatory policies will not be prejudiced, but will be promoted. Engle's unilateral amendment and disclaimer, which in effect amounted to an attempt to modify and change the basic provisions of his service contracts with his clients, was made without any consideration and without any notification to or agreement with his clients. It was ineffective as a matter of law; was not made effective by Engle's agreement with employees of the Wyoming State Office; and was subject to revocation or rescission at Engle's option. If a client, after winning a lease in a drawing and then being informed for the first time of the amendment and disclaimer

and the agreement with the Wyoming State Office, refused to execute a new service agreement with Engle and sold the lease to a bona fide purchaser, Engle could then revoke or rescind the amendment and disclaimer and demand his share of the proceeds called for under the original service agreement. To give effect to such an arrangement would establish a precedent that would allow open flaunting of the prohibition against multiple filings and foreclose the Department from preventing flagrant abuses of the drawing-lottery system. The Department could not, under such circumstances, effectively insure that there were no hidden interests in other parties' lease offers and that one party did not have more than one chance of obtaining an interest in a lease in a drawing.

8. There is no merit to the appellants' argument that since Federal regulations and existing adjudicatory precedents do not specify how forbidden interests relating to leases of public land can be

eradicated, any reasonable means agreed to between the holder of the interests and a representative of the Bureau of Land Management should be given legal effect. There is no reason why the regulations or adjudicatory precedents should so specify. The regulations are abundantly clear in defining forbidden interests and there is no justifiable reason for such interests to exist. If they do arise, they can readily and easily be eliminated by a party interested in following fundamental and established legal precedents rather than concocting a procedure calculated (a) to maintain a viable leasing service business, and (b) to minimize the chances of being foreclosed from sharing in any profits that might be obtained from a lease. Any "reasonable means" agreed to between the holder of a forbidden interest and a representative of the Bureau of Land Management cannot automatically and as a general proposition be given legal effect because (a) under existing regulatory procedures no represen-

tative of the Bureau of Land Management can enter into a binding agreement that would nullify the Department's adjudication and appellate procedures; and (b) the Secretary of the Interior could not properly discharge his duties as guardian of the public lands if he was compelled to either (i) promulgate regulations covering every conceivable (and undreamed of) legal problem that might arise in the management, use and disposition of the public lands or (ii) suffer the consequences of local employees in the various state offices of the Bureau entering into agreements that would bind him in the administration of the multitude of public land laws. In any event, the approach agreed to between Engle and employees of the Wyoming State Office was not a reasonable means because, as a matter of basic contract law, it did not eradicate the forbidden interest and, if adopted, would prevent the Department from maintaining the integrity of its drawing-lottery system.

9. There is no merit to the appellants' arguments that enforcement of such agreements is a fair and reasonable method of resolving such regulatory gaps and the principal (a) draws sustenance from established principles governing agreements entered into and promises made by governmental entities in the course of carrying out their proprietary functions; (b) is supported by the principle of equitable estoppel; (c) draws sustenance from the principle relating to retroactive application of new legal rules; and (d) draws sustenance from the principle of apparent authority.

a. Entering into a lease agreement involving public lands with a private citizen, does not, as contended by the appellants, fall squarely within the proprietary sphere where governments have been held to their agreements and estopped from taking a contrary position. Transactions of the United States relating to the management, use and disposition of public lands and their resources are for the benefit

of all the people and are considered a governmental rather than proprietary function. Utah Power & Light Company v. United States, 243 U.S. 389 (1917); United States v. California, 332 U.S. (1947); United States v. State of Florida, 482 F.2d 205 (5th Cir. 1973).

b. The doctrine of equitable estoppel does not bind the Secretary of the Interior of the United States to the agreement reached between Engle and employees of the Wyoming State Office. The principal case relied on by the appellants, United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), outlines the test of equitable estoppel as: (i) the party to be estopped must know the facts; (ii) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (iii) the latter must be ignorant of the true facts; and (iv) he must rely on the former's conduct to his injury.

i. Contrary to the appellants' assertion, the employees of the Wyoming State Office did not know, and could not have known, what would be sufficient to eradicate the objectionable provisions of the service agreement. The only thing they knew in this regard is what, in their opinion, would be sufficient to accomplish the eradication. There is no evidence suggesting that the employees of the Wyoming State Office ever represented affirmatively that either the Secretary of the Interior (through his delegate the Board of Land Appeals) or any other Bureau state office would be bound by their interpretation of the legal effectiveness of the amendment and disclaimer. The employees of the Wyoming State Office did not represent, did not purport to represent,

and could not speak for any office other than their own. They were not in any position to know, did not purport to know, and could not have known, what the Board of Land Appeals or any other Bureau state office would conclude as to the legal effectiveness of the amendment and disclaimer. They could not, and did not purport to, bind the Secretary of the Interior or his delegates to a determination as to what would be sufficient to eradicate the forbidden interest. They could not, and did not purport to, nullify the Department's adjudication and appellate procedures.

ii. The only thing Engle and his attorney had a right to believe was that the Wyoming State Office would not on its own initiative, and during an interim appeal period, take any action to reject

any of Engle's clients' lease offers if agreed procedures were followed. The employees of the Wyoming State Office simply attempted to make a temporary accommodation that would permit Engle's leasing service business to continue without interruption pending appellate and possibly judicial review. They warned Engle and his attorney that the accommodation was risky and they did not know, and could not determine, what the Department or any other Bureau office would conclude as to the effect of the amendment and disclaimer.

iii. Engle and his attorney were not, or should not have been, ignorant of the true facts. There was no reasonable basis for Engle or his attorney to suppose (a) that the employees of the Wyoming State Office repre-

sented or spoke for any office other than their own; (b) that the employees knew, or could have known, what the Board of Land Appeals or any other Bureau state office would conclude as to the legal effectiveness of the amendment and disclaimer; (c) that the Secretary of the Interior or his delegates would be bound by the interpretation of local employees of the Bureau as to the legal effectiveness of the amendment and disclaimer; and (d) that the local employees of the Bureau could nullify and render completely meaningless the Department's adjudication and appellate procedures.

iv. Engle and his attorney were fully informed, or should have been aware, of every aspect of the matter. They were advised of, and had, other alternatives

to the conditional amendment and disclaimer procedure concocted and proposed to the Wyoming State Office. Engle could have continued to use the existing service agreement and simply disclosed his interest in his clients' lease offers in accordance with 43 CFR 3102.7. He chose not to follow this procedure because this would foreclose him from representing more than one client in a drawing for the same parcel of land. Engle could have adopted a new service agreement eliminating the prohibited interest. He chose not to follow this procedure because of the "horrendous" amount of paperwork involved with some 4,000 to 6,000 existing clients. In addition, such a procedure would undoubtedly have created problems in obtaining an exclusive agency agreement

after a drawing that could be avoided or minimized under the amendment and disclaimer procedure. If Engle had had any interest in anything other than reaching an agreement under which his leasing service business would remain viable and he would minimize the chances of being foreclosed from sharing in any profits that might be obtained from a lease, then he would not have refused to take the courses suggested by the Wyoming State Office which would have extricated him and his clients from the difficulty created by the prohibited interest.

c. There is no retroactive application of a new legal rule involved in this proceeding. There was no old rule, regulation, or authoritative pronouncement that the amendment and disclaimer procedure proposed by Engle and his

attorney would be an effective means of eliminating the prohibited interest. An agreement reached with employees of a local Bureau of Land Management office does not constitute a legal rule that cannot be changed by the Department except by prospective application. A contrary conclusion would render the Department's adjudication and appellate procedures meaningless and make it impossible for the Secretary to properly discharge his duties and obligations as guardian of the public lands. There was a new legal rule, but only in the sense that any determination on a question of first impression by the Department or the Courts creates a new legal rule. The ruling on the effect of the amendment and disclaimer was a necessary consequence of the Department's adjudication and appellate procedures and Easterday's appeal from the Wyoming State Office decision rejecting his protest to the issuance of a lease to Coyer.

d. The principle of apparent authority, which is the power to bind a principal, which the principal has not actually granted, but which he leads persons with whom his agent deals to believe that he has granted to the agent, is not applicable in this proceeding. As the appellants recognize, the principle applies to a governmental entity only when government employees are acting in the course of carrying out proprietary functions. A proprietary function is not involved in this case. In addition, neither the Department of the Interior nor the Bureau of Land Management did anything that would have led Engle to believe, and a man of ordinary prudence, diligence, and discretion would not have had a right to believe, and would not have actually believed, that the employees of the Wyoming State Office possessed the authority and purported to act for any office

other than their own. The Department's adjudication and appellate procedures set forth in 43 CFR Part 4, which Engle and his attorney were, or should have been, familiar with at the time, would, without considering anything more, have been sufficient to dispel any idea that employees of the Wyoming State Office had authority to bind the Bureau or the Department.

10. There is no merit to the appellants' arguments that, in any event, Engle's amendment and disclaimer effectively operated as a waiver or relinquishment of his interests in his clients' lease offers; that when the amendment and disclaimer document was executed Engle was powerless to later assert his rights without the consent of his clients; and that consideration, communication, and agreements with his clients were unnecessary. Engle's unilateral and conditional attempt to amend, disclaim, waive or renounce the exclusive agency provisions of his service agreements was not a waiver, as that term

has variously and loosely been construed. It was an attempt to modify and change the basic provisions of his service agreements with his clients; and, as such it was not effective without consideration and mutual assent. In any event, if Engle's amendment and disclaimer document can be construed as a waiver, rather than a modification of his service contracts, the law that would apply is that set forth in the decisions of the Board of Land Appeals in the Easterday case and the Lowey case and not that set forth in the appellants' brief. The authoritative treatises cited by the Board, Williston on Contracts, Third Edition, §689 (1961), §690 (1961), §1820 (1972); 3A Corbin, Contracts §752 (1960); 5A Corbin, Contracts, §1238 (1964), state that waivers are not effective and can be rescinded at will in the absence of consideration of justifiable reliance. There was no consideration here, and there could not have been any reliance because Coyer was not aware of the alleged waiver,

which was subject to a condition subsequent, prior to the drawing.

11. When the Wyoming State Office issued its decision rejecting Easterday's protest against the issuance of a lease to Coyer, Easterday filed an appeal pursuant to 43 CFR 4.410. He served Coyer with copies of all documents filed in connection with the appeal, as required by 43 CFR 4.413. Coyer did not participate, either individually or through Engle, in the proceedings on appeal to the Board of Land Appeals. Coyer (and through him, Engle) had the right and opportunity to participate in the appeal under 43 CFR 4.414. Coyer and Engle should be precluded under fundamental principles relating to exhaustion of administrative remedies from (a) obtaining any relief from or any reconsideration of the Board's decision in the Easterday case; and (b) from presenting new theories which were not litigated before the Board in the Easterday case, i.e., issues relating to the agreement between Engle and employees of the Wyoming State Office concerning

Engle's amendment and disclaimer, in an effort to alter the results of the Board's decision in the Easterday case. St. Regis Paper Co. v. Marshall, 591 F.2d 612 (10th Cir. 1979).

12. Engle litigated the effect of the amendment and disclaimer and the agreement with employees of the Wyoming State Office in another case decided by the Board, i.e., Frederick W. Lowey et al., Supra. He should now be precluded from again litigating the same issues or new issues relating to the same subject matter.

13. The appellants did not prove, as required by the Board's order for a hearing in this proceeding, reversible error in the rulings of the Board in its Easterday decision that (a) Engle's service agreement gave Engle an interest in Coyer's offer within the meaning of 43 CFR 3100.0-5(b); (b) Engle's alleged waiver or disclaimer of that interest was ineffective as a matter of law; (c) Coyer's offer violated 43 CFR 3102.7, which required a timely

disclosure of Engle's interest in the offer; and (d) there was a violation of 43 CFR 3112.5-2, which prohibits multiple filings, because Engle may have represented some 200 other client-offerors under similar service agreements in the drawing for parcel No. 44. No satisfactory evidence was presented as to whether Engle did or did not, in fact, represent other client-offerors under his standard form service agreement in the drawing for parcel No. 44. Engle could have presented evidence on this question sufficient to support a specific finding. He did not, but simply testified that he assumed he had filed for more than one client in the drawing.

14. The appellants did not prove reversible error in the ruling of the Board in its decision in Coyer v. Easterday, supra, that Coyer was barred under the principal of res judicata from litigating any issues that were or could have been presented to the Board in its consideration of Easterday's appeal.

For the reasons stated, Coyer's offer should be rejected and the lease issued to Easterday if he was a qualified offeror.

/s/Robert W. Mesch
Administrative Law Judge

APPENDIX

Fred L. Engle, doing business as Resource Service Company, is, and has been since November of 1973, engaged in soliciting individuals to participate in the monthly simultaneous oil and gas lease drawings conducted by the various state offices of the Bureau of Land Management. (Tr. 58-61). A brochure that he distributed contains the following, among other, enticements:

> Newspaper Zone Manager from Ogden, Iowa won the oil and gas lease rights to a 1,264 acre parcel of government land that immediately sold for $265,505 plus a 5% overriding royalty on all future oil and gas production. If exploration proves fruitful, our client could realistically become a millionaire without any additional investment on his part. (Appellants' Ex. No. 31)

From the inception of his business until early 1978, Engle used a standard form agreement, captioned "Service Agreement",

in filing drawing entry card offers for clients. (Tr. 60). Under the agreement, the client submitted to Engle the filing fees required by the Bureau of Land Management and service fees covering Engle's services in connection with each drawing. Engle was authorized to select parcels of land for filing and to complete and file drawing entry card offers for the clients. The agreement also authorized Engle to act, for a period of five years, as the sole and exclusive agent for the client in negotiating the sublease, assignment or sale of any rights the client obtained by reason of being successful in a drawing. It provided that if a sale, assignment or sublease was negotiated, either by Engle or the client during the five-year period of the agency, Engle would share on a percentage basis in any cash price paid to the client and if royalty payments were made Engle would share on a percentage basis in such payments. Any final negotiated price was subject to the clients' approval. The

agreement also provided that if the client did not receive at least $10,000 gross in aggregate on the outright sale of a lease, Engle would process up to 300 additional lease applications free of service fees. Engle was authorized to handle all of the client's correspondence at his address. (Appellants' Ex. No. 1). Engle did not submit the agreement or otherwise apprise the various state offices of the Bureau that such an agreement existed when filing drawing entry card offers for clients.

In December of 1976, Engle's service agreement was broughtto the attention of employees of the Wyoming State Office of the Bureau. As a result, that office issued decisions rejecting three simultaneously filed oil and gas lease offers of Engle's clients, i.e., Lola I. Doe, Sidney H. Schreter, and William F. Wopp, Jr., that had been drawn first for three parcels in the November 1976 drawing. The state office decisions held that (1) Engle's service agreement gave Engle an interest in his clients'

lease offers within the meaning of 43 CFR 3100.0-5(b) by reason of the exclusive agency provision and the right to share in the profits from the sale of a lease; (2) there was a violation of 43 CFR 3102.7 because Engle's interest in the offer was not disclosed; and (3) there was a violation of 43 CFR 3112.5-2 because Engle had the same interest in more than one clients' lease offer submitted for the same parcel. (Appellants' Ex. No. 28, pp. 59-60).

The regulations relied on by the Wyoming State Office provide in part:

> 43 CFR 3100.0-5(b) * * * An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.
>
> 43 CFR 3102.7 * * * If there are other parties interested in the offer a separate statement must be signed

by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer.

43 CFR 3112.5-2 * * * Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected.

Engle appealed the decisions of the Wyoming State Office, not in his name, but, in the names of his clients. The appeals were taken pursuant to 43 CFR 4.410 which provides that "any party to a case who is adversely affected by a decision

of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board [of Land Appeals]". (Tr. 150-151).

When Engle became aware of the position taken by the Wyoming State Office in its rejection decisions, he and his then attorney, Harry W. Theuerkauf, contacted the Wyoming State Office in an attempt to find a way to avoid the risk of future disqualifications of winning clients pending appellate and possibly judicial review of the Wyoming State Office's rejection decisions. They were referred to John D. Erdmann, a Paralegal Specialist working in the Oil and Gas Section of the Branch of Lands and Minerals Operations of the Division of Technical Services in the Wyoming State Office. Engle and Theuerkauf reached an understanding with Erdmann, which was concurred in by Harold G. Stinchcomb, Chief, Branch of Lands and Minerals Operations, and Glenna M. Lane, Chief, Oil and Gas Section, that Engle could continue to use his standard form service agreement, as to both existing and new

clients, pending appellate and possibly judicial review and the Wyoming State Office would not disqualify any winning clients if (1) Engle filed a document drafted by his attorney designated "Amendment and Disclaimer" with the Wyoming State Office; (2) Engle notified each successful client, after the drawing, of the disclaimer and of the clients being free to either enter into a new service agreement with Engle or to decline to do so and be under no further obligation; and (3) Engle provided the Wyoming State Office with information sufficient to enable it to satisfactorily monitor Engle's adherence to the understanding. (Appellants' Ex. No. 28, pp. 60, 69-85, 90-91, 115-118, 121-123).

Engle did not want to revise his standard form service agreement because of his uncertainty as to whether the position of the Wyoming State Office that the agreement gave Engle an interest in his clients' lease offers would be sustained on appeal and because of problems posed by the large number of clients (between 4,000 and 6,000)

that Engle had at the time. (Appellants' Ex. No. 25, pp. 9, 12-13). He did not want to avoid the problem created by his service agreement by disclosing his interest and filing the statements and information required by 43 CFR 3102.7 because, as he advised Erdmann, "there's obviously going to be more than one [filing] per parcel". Appellants' Ex. No. 28, p. 72).

The personnel of the Wyoming State Office did not feel that they could compel Engle to revise his service agreement until their position had been sustained by the Interior Board of Land Appeals and they felt that the amendment and disclaimer proposal submitted by Engle and his attorney would solve the problem on an interim basis pending the appeals and possibly judicial review. (Appellants' Ex. No. 28, p. 91).

In a subsequent deposition, Erdmann testified as follows with respect to his conversations with Engle's attorney, Theuerkauf:

A. * * * I explained that I was not counsel for the Department of the Interior; I explained that I could not speak for anybody except those people in the Wyoming State Office and as to what their inclinations were; that there was the possibility that further protests would be made; and that upon review at whatever level that the accommodation that we were making to his business needs might not withstand more authoritative examination. (Appellants' Ex. No. 28, pp. 117, 118)

* * * * * * * * *

A. * * * that I and the people in the Wyoming State Office, particularly the Branch of Land and Minerals Operations, were not happy with the idea of the accommodation we were coming to, but we felt that it would not be injurious to the public interest that the purposes of the regulations would be accomplished, but that I would -- that I was concerned and apprehensive that something might go awry with the thing. And that if he wanted to rely on that amendment and disclaimer, we weren't going to say no to it. But frankly, I didn't think it was a good idea; that we would prefer he rewrite his agreement this way. We thought that Mr. Engle ought to rewrite the service agreement the way we thought it ought to be written. (Appellants' Ex. No. 28, pp. 122, 123)

In his deposition, Theuerkauf explained his understanding of the conversations with Erdmann as follows:

A. * * * He [Erdmann] at first thought that we should immediately file a

-- start using or send out to everybody a new service agreement. So we told him what the problems were, and he was sympathetic to the problem of that, but he still thought that something had to be done.

When we proposed this [the amendment and disclaimer], he said this was the solution. (Appellants' Ex. No. 25, P. 12)

* * * * * * *

Q. During the period beginning December of 1976 and concluding in March of 1978 when the Government approved the new service agreement, did any Government official ever tell you that the use of the amendment and disclaimer, Exhibit 2, would be risky?

A. Never. (Appellants' Ex. No. 25, pp. 26, 27)

* * * * * * *

Q. And what did you do when you found out that a state office [New Mexico in March 1978] had rejected the disclaimer?

A. I called Mr. Erdmann and said, "What's going on, you know? We had this agreement. We've complied with the agreement, and so far up until today you complied with the agreement."

Q. What was Mr. Erdmann's response?

A. That was the first time that he told me that that agreement was only valid with the Cheyenne office of the Bureau of Land Management. (Appellants' Ex. No. 25, p. 29)

* * * * * * *

Q. I'm asking you, Mr. Theuerkauf, what you would have recommended to Mr. Engle in December of '76 or January of '77 had Mr. Erdmann expressed the qualifications he first expressed in March of '78.

A. * * * And if we had any doubt that we weren't dealing with the Bureau of Land Management and that we had to go to * * * sixteen states, we would have very seriously considered another way.

And, remember, at that time we were considering revision of the service agreement, we were considering the disclaimer and amendment and many other options that we had talked about. But if I had any idea that that would have jeopardized those 4,000 people, we certainly would have given more thought to another route. (Appellants' Ex. No. 25, pp. 30, 31)

* * * * * * * *

A.. * * * If on January 13th when I talked to Mr. Erdmann he had said, "Under no circumstances would we accept a disclaimer, that creates an interest and that's it and you've got to have a new service agreement," we probably would have done it, because at that point Mr. Engle was interested only in qualifying his clients.

Now, they didn't say that, but if they would have, that's probably what we would have done. * * * (Appellants' Ex. No. 25, p. 54)

Pursuant to the arrangement reached with Erdmann, Engle executed the amendment and disclaimer document on January 13,

1977. It was received by the Wyoming State Office on or about January 18, 1977. (Tr. 66-68). This document recited that Engle "is a party to various contracts designated as service agreements with various customers for drawings"; that "it is possible that the Bureau of Land Management may opine that said exclusive agency, in fact, vests in the undersigned an interest in the lease or offer"; and that "it is the intention and desire of the undersigned to avoid any adverse consequences or delays which may result should the Bureau of Land Management adopt such an opinion". The document then stated that "I [Engle] do hereby waive and renounce any exclusive agency which I may have by reason of said service agreements with said offerors from and after this date"; that "said waiver and renunciation shall become operative forthwith and shall inure forthwith for the benefit of all said offerors"; and that "in the event a determination is made following the exhaustion of all administrative remedies and

judicial remedies that said exclusive agency does not constitute an interest of the undersigned in said oil and gas leases, then and in that event this Amendment and Disclaimer shall be null and void as if never executed". (Appellants' Ex. No. 2).

The recitals in Engle's amendment and disclaimer document are a clear recognition by Engle that the Wyoming State Office, which had already ruled that the exclusive agency provision did, in fact, create a prohibited interest in Engle in his clients' offers, was not the same as the Bureau of Land Management and did not speak for the Bureau of Land Management or the Department of the Interior. The recitals belie Engle's assertions that he believed he was dealing with the Bureau of Land Management, and not simply the Wyoming State Office, in arranging the amendment and disclaimer procedure.

On March 12, 1977, one Eugene R. Fischer

filed protests with the Wyoming State Office against the issuance of six leases to clients of Engle that were winners in the January 1977 drawing. When informed of the protests, Theuerkauf sent a letter to Erdmann dated April 4, 1977, in which he (1) confirmed the filing of the amendment and disclaimer with the Wyoming State Office; (2) provided a copy of the form letter used by Engle which "communicates the disclaimer to the winner and permits him to do whatever he considers in his best interest with the lease without any commitment to Resource Service Company"; and (3) provided a copy of the agency contract used by Engle "to permit the winner to reinstate the sales agency terminated by the disclaimer if the winner chooses to do so". (Appellants' Ex. No. 18).

On April 12, 1977, the Wyoming State Office issued a decision over the signature of Glenna M. Lane, Chief, Oil and Gas Section, dismissing the Fischer protest. This decision stated:

> By agreement between this office and Mr. Fred Engle of the Resource Service Company, the objectionable portions of that company's service agreement have been eliminated. By amendment and disclaimer dated January 13, 1977, Mr. Engle has waived all rights to an exclusive agency to sell his clients' leases as set out in the original service agreement. Until he can put newly printed forms into use, Mr. Engle will notify any of his clients who are winners in our simultaneous drawings that they are not bound by the exclusive agency agreement. The clients so notified will be invited to execute new agreements if they desire to do so after they are notified of winning a drawing. This procedure will conform to our regulations. (Appellants' Ex. No. 5)

A copy of this decision was sent to Theuerkauf. The decision advised the protestant, Fischer, of his right of appeal to the Board of Land Appeals. No appeal was taken.

Donald W. Coyer, Engle's client, whose drawing entry card offer was drawn first for parcel No. 44 in the May 1977 monthly drawing conducted by the Wyoming State Office, has been employed as a police Electronics technician for the City of Milwaukee for 24 years. Coyer responded to a newspaper advertisement place by Engle

and, as a result, executed a service agreement with Engle through his Resource Service Company on January 4, 1977. The agreement was the standard form agreement used by Engle between 1973 and 1978. (Tr. 27-28).

On May 9, 1977, Engle called Coyer to inform him that he had been a winner in the May 1977 drawing. Coyer met with Engle on that date (his first meeting with Engle) and Engle gave Coyer (1) a form letter dated May 9, 1977, addressed to Coyer; (2) a copy of the amendment and disclaimer; and (3) a new agency agreement. (Tr. 29-30). At that time, Coyer executed the new agency agreement which contained the same terms and conditions as the original service agreement with respect to the exclusive agency and Engle's right to share on a percentage basis in any cash price and royalty payments received by Coyer. The agreement did not, however, contain the provision that Engle would process up to 300 additional lease applications free of service fees if Coyer did not receive at least $10,000 gross on the

sale of the lease. The form letter addressed to Coyer stated in part:

> We are in the process of working with the Bureau of Land Management in an effort to determine if the Sales Agreement portion of our Service Agreement presents a "sole party in interest" question. There has been a suggestion that this clause possibly gives an interest to us in our client's lease. * * * To remove any doubt that our clients are in fact the exclusive owners of their leases and to protect their best interests we have informed the Bureau that we do not consider this exclusive clause binding if it created an interest in us. The Bureau has suggested that if the Sales Agreement is signed after the drawing there is no question presented. (Appellants' Ex. No. 4)

Prior to his first meeting with Engle on May 9, 1977, Coyer did not know that Engle had executed the amendment and disclaimer document. Prior to that meeting, Coyer had not agreed to any modification of his contract with Engle and no consideration had been given for any contractual modification.

On July 15, 1977, Alfred L. Easterday, whose entry card offer was drawn second to the card submitted by Coyer for parcel No. 44, filed a protest with the Wyoming

State Office against the issuance of the lease to Coyer. He contended that Coyer's service agreement with Engle invested Engle with an undisclosed interest in the offer and lease if issued.

While Easterday's protest was pending before the Wyoming State Office, the Interior Board of Land Appeals, acting for the Secretary of the Interior pursuant to 43 CFR 4.1(b)(3), issued two decisions on Engle's appeals from the decisions of the Wyoming State Office rejecting three offers of Engle's clients that had been drawn first in the November 1976 drawing. Lola I. Doe, 31 IBLA 394 (August 19, 1977) and Sydney H. Schreter, et al., 32 IBLA 148 (September 12, 1977). The Board affirmed the decisions of the Wyoming State Office holding that Engle's service agreement created an interest in Engle in his clients' lease offers within the meaning of 43 CFR 3100.0-5(b) and, as a result, the interest should have been disclosed as required by 43 CFR 3102.7. Neither Engle nor his clients sought judi-

cial review of the Board's decisions within the time period prescribed by 30 U.S.C. §226-2 and 43 CFR 3100.0-9.

On October 25, 1977, the Wyoming State Office issued a decision over the signature of Glenna M. Lane, Chief, Oil and Gas Section, dismissing Easterday's protest. This decision stated:

> As you can read from the enclosed decision of the Interior Board of Land Appeals (IBLA), this office has successfully challenged the service agreement used by Mr. Fred Engle, dba Resource Service Company, who was Mr. Coyer's filing agent. However, in order to protect his clients during the IBLA consideration of his appeal from our decision challenging his service agreement, Mr. Engle submitted an amendment and disclaimer dated January 13, 1977, by which he waived all rights to an exclusive agency and agreed not to enforce the objectional [sic] portions of the service agreement calling for a percentage commission on all lease sales and royalties benefitting [sic] his clients. Mr. Engle has notified all of his clients who are winners in the simultaneous drawings to the effect that they are not bound by the objectionable provisions of the original service agreement. We are treating the objectionable provisions as if they have no effect because they will not be enforced.
>
> In the case at hand, Mr. Coyer executed a new agreement with Mr. Engle after

> being notified that he was a winner. The new agreement is nearly the same as the original service agreement, but the fact that it was executed after the publications of the winners' list removes all of our objections. (Appellants' Ex. No. 7)

The decision of the Wyoming State Office provided, pursuant to 43 CFR 4.410, that Easterday had the right of appeal to the Board of Land Appeals. It also provided that if an appeal was taken, Easterday was required to provide copies of his notice of appeal and statement of reasons to Coyer.

Easterday filed an appeal and pursuant to 43 CFR 4.413 served Coyer with copies of all documents filed in connection with the appeal. Engle was also aware of the appeal. Coyer did not participate, either individually or through Engle, in the proceedings on appeal. Coyer had the right and the opportunity to participate in the appeal under 43 CFR 4.414, which provides:

> If any party served with a notice of appeal wishes to participate in the proceedings on appeal, he must file an answer within 30 days after

service on him of the notice of appeal or statement of reasons where such statement was not included in the notice of appeal. * * * The answer must state the reasons why the answerer thinks the appeal should not be sustained. * * *

If Coyer had participated in the appeal, he could have sought further proceedings under 43 CFR 4.415, which provides:

> Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to an administrative law judge for such a hearing. * * *

If Coyer had participated in the appeal and the Board had ordered a hearing, the case would have been in precisely the same posture as it is now, almost three years later, with the exception, that the issues would then have been ones of first impression.

Coyer testified that he discussed the Easterday appeal with Engle, but did not participate with Engle or his attorney, Theuerkauf, in deciding whether or not he would become involved in the appeal. Engle testified that they did not participate in the appeal because:

A. * * * it was 100 percent clear-

cut that that case would be affirmed by the IBLA in my mind. There was no question in my mind that they would affirm the local BLM's decision.

Q. You had been aware of and you were satisfied that you would get a favorable decision?

A. I was 100 percent sure that the government would honor the agreement that they had entered into with me, besides, the government was supposed to be representing his [Coyer's] interests to start with, which they failed to do so. (Tr. 141, 142)

On January 4, 1978, the Wyoming State Office wrote a letter to Engle pointing out that the time for seeking judicial review of the Board's decisions in Lola I. Doe, supra, and Sidney H. Schreter, et al., supra, had expired and insisting that Engle revise his service agreement to omit the objectionable provision that, in the interim period, had been deemed ineffective by the Wyoming State Office as a result of the amendment and disclaimer. (Appellants' Ex. No. 19). In March of 1978, a redrafted agreement was tendered and found acceptable. By a letter dated

April 10, 1978, Engle transmitted the new agreements to his clients for their signature. The letter stated, in part, "please notice that the agreement to have us handle the sale of your lease, in the event you win, will now be optional". (Appellants' Ex. No. 32). It is difficult to understand this statement in view of Engle's insistence that his amendment and disclaimer document effectively eradicated, as of January 13, 1977, the exclusive agency provision in his service agreements and made it optional with the clients as to whether Engle would handle the sale of any lease won in a drawing.

In its decision on appeal, Alfred L. Easterday, 34 IBLA 195 (March 22, 1978), the Board of Land Appeals held, as it had in the previous cases involving Engle's service agreement, that Engle had an undisclosed interest in Coyer's offer. The Board also held that Engle's alleged waiver or disclaimer of that interest was without effect as a matter of law and the original

service agreement remained in effect as of the date of the drawing giving Engle a prohibited interest in the lease. The Board stated:

> Engle's unilateral action did not alter the contractual obligations of the parties as they existed as of the date of the drawing. First, the waiver document was not communicated to Coyer until after the drawing, and a new agreement was not ratified by Coyer until after he was declared the winner for parcel No. 44. The waiver served notice to the BLM that RSC did not intend to enforce the objectionable provisions of the service agreement. However, without notice to, or an agreement with Coyer, Engle was not bound to carry out the terms of the alleged amendment. It is fundamental to the formation of a contract that there be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract. * * *
>
> Next, there was no consideration given to Engle by his client for his forbearance from enforcing his contractual rights. It is a fundamental legal requisite for the formation of an enforceable contract that legally sufficient consideration be given for a promise. (Appellants' Ex. No. 8)

The Board concluded that Coyer's offer was violative of 43 CFR 3102.7, which required Coyer to make a timely showing of Engle's interest in the offer

and that there was a violation of 43 CFR 3112.5-2, which prohibits multiple filings, because there was evidence that Engle "may have represented some 200 other client-offerors" under similar service agreements in the drawing for the one parcel. The Board reversed the decision of the Wyoming State Office and remanded the case for action consistent with its decision.

No evidence was presented at the hearing as to whether Engle did or did not, in fact, file other offer cards for other clients in the May 1977 drawing for parcel No. 44. The only satisfactory evidence on this subject consisted of Engle's testimony that:

> A. * * * Is it your practice to file more than one card for more than one client in each drawing?
>
> A. It is a practice.
>
> Q. Is there any reason you have to doubt that you did it in this case?
>
> A. No, but if you want to be accurate, we could get the records on it instead of surmising. We had 5,150.
>
> Q. Just more than one, that's what I want to know.

A. I would assume that we had more than one, but I really don't know. (Tr. 136)

On April 10, 1978, the Wyoming State Office issued a decision rejecting Coyer's lease offer. The decision advised Coyer that he had a right of appeal to the Board of Land Appeals and named Easterday as the adverse party to be served in the event of an appeal. Coyer filed an appeal to the Board. Easterday participated in the proceedings on appeal. In his appeal, Coyer contended (1) that the Government was estopped from penalizing Coyer because his agent, Engle, relied to his detriment on assurances and representations made by employees of the Wyoming State Office; (2) that Engle effectively waived any exclusive agency agreement with Coyer before he filed Coyer's offer with the Wyoming State Office; and (3) that the exclusive agency agreement did not, in any event, give Engle an interest in the lease within the meaning of 43 CFR 3112.5-2. Coyer also requested the

Board to grant an evidentiary hearing to resolve all factual disputes.

On June 20, 1978, Coyer and Engle filed a complaint in the United States District Court for the District of Wyoming, Coyer, et al. v. Andrus, et al., Civil No. C 78-104, in order, among other things, to preserve their rights under 30 U.S.C. §226-2 to appeal from the Board's decison of March 22, 1978, in the Easterday case.

On July 31, 1978, the Board issued its decision on Coyer's appeal. Coyer v. Easterday, 36 IBLA 181. In dismissing the appeal, the Board stated:

> Coyer's appeal is, in effect, an appeal of the decision of this Board in Easterday, involving the same parties, the same events, the same lease, and is before the same tribunal. Although it purports to be an appeal from the action of the Wyoming State Office in rejecting Coyer's lease offer, that action was merely the ministerial implementation of the Easterday decision, and carried no right of appeal to the Board. The decision of this Board is final for the Department, and no further appeal will lie in the Department. 43 CFR 4.21(c). Where an appeal has been taken and a final departmental decision has been reached, under the doctrine of administrative finality the principle of res judicata will operate

to bar consideration of a new appeal arising from a later proceeding involving the same parties, the same land and the same issues.

* * * * * * *

This appeal is clearly a manifestation of a case barred by the principle of res judicata, and must be dismissed for that reason. (Appellants' Ex. No. 9)

On October 30, 1978, Coyer and Engle appealed the Board decision of July 31, 1978, in Coyer v. Easterday, supra, by the filing of a complaint and a petition for review in the United States District Court for the District of Wyoming. Coyer, et al. v. Andrus, et al., Civil No. C78-213 and Coyer, et al. vs. Andrus, et al., Civil No. C 78-214.

On February 12, 1979, the Court issued an order in Civil No. C78-104, the action seeking review of the Board's decision of March 22, 1978, in the Easterday case. The Court stated, in part:

* * * the Court having considered the argument of counsel and having fully and carefully reviewed the record on appeal, finds the following facts are not in dispute: plaintiff Coyer has an agreement with a leasing service known as Fred L. Engle, d/b/a

Resource Service Company; the agreement creates an undisclosed interest violative of the regulations (Lola I. Doe, 31 IBLA 394, August 19, 1977 and Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148, September 12, 1977); following these decisions Engle filed a disclaimer with the Wyoming State Office stating that any of his clients who might be awarded a lease would not be bound by the invalid agreement; the Wyoming State Office treated the objectionable parts of the agreement as if they had no effect.

Plaintiff Coyer drew the first card, Easterday the second, and Roe the third; Coyer was awarded the lease by the Wyoming State Office; Easterday protested; his protest was dismissed by the Wyoming State Office; Easterday appealed to the IBLA; the IBLA reversed the decision of the Wyoming State Office, finding that the alleged disclaimer was without effect to bind the parties to it and remanded it to the Wyoming State Office; Coyer failed to appear or submit briefs on the appeal.

Following the above actions, the Wyoming State Office rejected Coyer's priority status and awarded the lease to Easterday; Coyer was advised of his right of appeal to the IBLA; Coyer appealed to IBLA and his appeal was dismissed as being res judicata in the light of the earlier Easterday appeal and decision.

Coyer instituted the present action in this Court for injunctive and declaratory relief, alleging arbitrary and capricious action on the part of the Secretary.

* * * * * * *

> Taking the record as a whole, this Court finds the record is in such a state of confusion that an intelligent review is not possible, and the Court being fully advised in the premises; it is
>
> ORDERED that said matter be remanded to the Wyoming State Office where each of the parties will be given a full opportunity to appear in person and present such evidence as may be relevant to the interest of each.

Somewhere in the course of the proceedings, the administrative record was lost. It is not known whether the Court was aware of this fact when it issued its remand order.

On February 13, 1979, the Court dismissed without prejudice the other two actions, Civil Nos. C 78-213 and C 78-214, as being moot because of the remand to the Wyoming State Office "for a redetermination of the rights of the parties".

While the parties were attempting to arrive at a procedure to accommodate the Court's remand order, the Interior Board of Land Appeals issued a decision in Frederick W. Lowey, et al., 40 IBLA 381 (May 14, 1979). This case involved

appeals by Engle and six of his clients whose drawing entry card offers were drawn first in monthly drawings conducted by the New Mexico State Office of the Bureau of Land Management between December 1977 and April 1978. The New Mexico State Office had rejected the winning offers because Engle, through his Resource Service Company and his service agreements, had an interest in the offers and the offerors failed to disclose the existence of the interest as required by 43 CFR 3102.7. The New Mexico State Office gave no effect to Engle's amendment and disclaimer which had been executed January 13, 1977 and filed with the New Mexico State Office on March 29, 1977, some three and one-half months after it was filed with the Wyoming State Office.

The Board of Land Appeals held, among other things, that (1) as was previously concluded in Lola I. Doe, supra, Sidney H. Schreter, et al., supra, and Alfred L. Easterday, supra, the standard form

service agreement used by Engle in filing offers for clients in drawings gave Engle an interest in his clients' lease offers; and (2) as was previously concluded in Alfred L. Easterday, supra, Engle's amendment and disclaimer was without effect as a matter of law because there was no notice to, or any agreement with, the clients and there was no condsideration to support the amendment and disclaimer. The Board expanded on its reasoning in the Easterday decision, cited various authorities in support of its position, and stated:

> In the instant case, appellants promised to pay, on a commission basis, for the service of having sales of their leases arranged, which service Engle promised to render. Engle's bare statement that he renounced his right to receive a commission for arranging the sale did not discharge his right to claim the commission, as it was not supported by any consideration. That is, his clients did not agree to assume any additional obligation or to renounce any right in return therefor. Engle's right to receive a commission from any sale of any lease won by appellants over 5 years, which he purportedly renounced, has not yet come due and is not such that it will become essentially different from that which his clients originally bargained to render. Thus Engle may properly rescind his purported waiver and

sue to claim a share of the proceeds of any sale of appellants' lease rights. Nor could Engle be estopped from retracting his disclaimer, because his clients obviously could not have relied on his making the disclaimer, as he did not notify them that he had made it. * * *

* * * * * * * *

Appellants would have us hold that Engle's unilateral waiver, made without consideration and without notification to his clients until after their cards were drawn, effectively erased his interest in their offers. Were we to do so, we would establish a precedent which would allow open flaunting of the prohibition against multiple filings of 43 CFR 3112.5-2, as in this hypothetical situation: * * * [where a leasing service operates as Engle had and the amendment and disclaimer is held effective and a lease issued and then] The client, thinking that the service demands too high a commission, declines to renew his exclusive sales agency with the service, and instead sells the lease himself to a bona fide purchaser for a large return. The service rescinds its waiver of the sales agreement and sues its client, demanding its share of those proceeds, which, as discussed above, it would be legally entitled to recover * * * [at that time it would be] too late for the Department to take corrective action, * * * [and] the Department would be foreclosed from preventing a flagrant abuse of the lottery system by a leasing service.

In the Lowey case, the appellants contended that notwithstanding the legal

ineffectiveness of the disclaimer, the Department was estopped from rejecting the lease offers because (1) the Wyoming State Office gave its approval to Engle's procedure of filing a disclaimer which was unsupported by consideration and of notifying clients of the disclaimer only after they were winners; and (2) Engle relied on this approval and did not prepare new agreements which could have avoided any problems. In ruling on this argument, the Board stated:

> * * * Even disregarding 43 CFR 1810.3, which provides that the United States is not bound by the acts of its officers and agents, we have concluded that this matter is not appropriate for the extraordinary relief of equitable estoppel.

The Board then gave the following review of the circumstances:

> [Personnel at the Wyoming State Office] informed Engle that he would have to revise his contracts with his clients or face the possible rejection of his clients' offers in cases where Engle's interest was undisclosed. Engle refused to submit revised contracts to his clients, contending that Wyoming BLM was in error in its finding that he had an interest in his clients' offers and leases issued pursuant thereto.

He argued that it would be burdensome to contact each of his clients and get revised contracts executed, and that it would be unfair to require this of him, particularly if it were Ultimately held that Wyoming BLM was in error and the existing contracts were perfectly proper.

Instead, as an interim measure, he prevailed upon Wyoming BLM to accept his "Amendment and Disclaimer" pending a final determination of the question by this Board or, perhaps, by the courts. Although the personnel at Wyoming BLM (erroneously) allowed themselves to be persuaded to make this accommodation to Engle, contrary to their own holding in the matter, they expressly warned Engle and/or his attorney (1) that the use of the "Amendment and Disclaimer" would be "risky," but would avoid rejections by the Wyoming State Office until a final, authoritative decision could be made; (2) that they, as employees of the Wyoming State Office of BLM, could not commit the Department to acceptance of the "Amendment and Disclaimer,"and could not anticipate what might happen at the appeal stages; (3) that other state offices of BLM might reject the offers filed by Engle's clients; and (4) that Engle was taking a risk in not immediately revising its [sic] "Service Agreement" with his clients. The only assurances given either to Engle or his attorney were that the Wyoming State Office would accept the "Amendment and Disclaimer" on an interim basis and refrain from rejecting the offers of his clients until the matter was finally resolved.

The Board concluded:

> There is nothing in these events which could give rise to an equitable estoppel against the Government. The fact that certain employees in one BLM state office attempted to make some temporary accommodation in Engle's interest, while warning him that it would be risky, and that they were without power to determine what would be decided by the Department or other BLM offices, certainly was not a misrepresentation of any material fact, nor did it afford grounds for Engle's reliance, nor did it constitute Engle's reliance, nor did it constitute Engle's reliance, nor did it constitute "affirmative misconduct". Engle was fully informed of every aspect of the matter, and actually was adamant in his refusal to take the one course urged upon him by Wyoming BLM which would have extricated him--and his clients--from the difficulty.

The Board's decision in the Lowey case is presently before the United States District Court for the District of Columbia for judicial review. Lowey, et al. v. Andrus, et al., C.A. 79-3314-79-3319.

On June 19, 1979, the Board of Land Appeals issued an order in an attempt to comply with the Court's remand order of February 12, 1979. The Board construed the Court's remand to the Wyoming State Office as remanding the matter to the

Board. It explained this construction as follows:

> The reference to the Wyoming State Office (of the Bureau of Land Management) has engendered some confusion. Although the case originated there, as the consequence of the conflicting simultaneous ous oil and gas lease offers of Messrs. Coyer and Easterday, it is the decisions of this Board which are at issue. The Board of Land Appeals is a component of the Office of Hearings and Appeals, an adjunct of the Office of the Secretary of the Interior, with authority to hear, consider, and determine, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings and appeals and other review functions of the Secretary. 43 CFR 4.1. The Wyoming State Office, being a field office of a subordinate bureau of the Department, is not empowered to make findings or conclusions contrary to the final decisions of this Board.

The Board then stated:

> * * * a hearing will be ordered, to be conducted by an administrative law judge, at which the plaintiffs to the judicial litigation will be required to plead and prove reversible error in the decisions rendered by this Board in disposing of the respective appeals of Easterday and Coyer. * * *
>
> * * * the matter is hereby referred to the Hearings Division for assignment to an administrative law judge who will conduct a hearing pursuant to 43 CFR 4.415 for the reception of evidence on any relevant issues of

disputed fact, and to hear all arguments of fact and law. He will inquire into and resolve issues relating to the administrative record which reportedly has been lost, and make provision for the authentication of any reconstructed record offered in substitution therefor. Upon conclusion of the proceeding he will make proposed findings and conclusions for submission to this Board in accordance with 43 CFR 4.433.

On August 14, 1979, Coyer and Engle filed a motion with the United States District Court for the District of Wyoming in C-78-104 requesting an order, among other things, directing the Board of Land Appeals to withdraw its order dated June 19, 1979, and directing that during the hearing mandated by the Court Easterday shall have the burden of proving that Coyer is not entitled to the lease in question.

By an order dated August 31, 1979, the Court amended nunc pro tunc the last paragraph of its February 12, 1979 order quoted above to read essentially the same as the last paragraph of the board's order of June 19, 1979 quoted above. The Court's order did not, however, contain any references to 43 CFR 4.415 or 43 CFR 4.433.

A prehearing conference was held on October 12, 1979, Coyer and Engle pursued prehearing discovery proceedings, and a hearing was held on February 12, 1980, at which all parties were given a full opportunity to present such evidence as might be relevant to their interests. Extensive posthearing briefs and proposed findings and conclusions have been submitted.

The lost administrative record was found and received in evidence. No definite conclusions can be reached as to whether it contains precisely the same material that was before the Board when it considered the Easterday and Coyer appeals. Such a conclusion is not, however, of any consequence since the parties have presented all evidence deemed relevant to their respective positions.

ORDER OF U. S. DISTRICT COURT IN COYER V. ANDRUS, D.WYO.CIV.NOS. C-78-104K, C80-370K, C80-372K (1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DONALD W. COYER and FRED L. ENGLE, d/b/a RESOURCE SERVICE COMPANY,

Plaintiffs,

vs.

CECIL D. ANDRUS, Secretary of the Interior, United States Department of the Interior, et al.,

Defendants.

Nos. C78-104K
C80-370K
C80-372K

CONSOLIDATED

ORDER AFFIRMING
INTERIOR BOARD OF LAND APPEALS

[Filed March 5, 1981]

The above-entitled matter coming on regularly for hearing before the Court upon an appeal from a decision of the Interior Board of Land Appeals in these consolidated cases, plaintiffs appearing by and through their attorneys, David B. Kern and Jerome F. Statkus, and defendant Andrus appearing

by and through his attorneys, Eleanor M. Granger, Harold Baer and Jeffrey C. Fisher, and defendant Easterday appearing by and through his attorney, Morton J. Schmidt, and the Court having heard the arguments of counsel in support of and in opposition to said decision, and having carefully considered the pleadings, the records and files of the cases, and the memoranda briefs submitted by counsel, and being fully advised in the premises;

FINDS that Donald W. Coyer (Coyer) and Alfred L. Easterday (Easterday) were the first and second drawees respectively for parcel No. 44 in the simultaneous oil and gas lottery held in May of 1977.

Initially, Easterday protested the issuance of the lease to Coyer because Coyer's drawing entry card (DEC) was filed for him by Fred Engle d/b/a Resource Service Company (RSC). Easterday contended that the agreement between Coyer and RSC violated

the sole party in interest regulation, 43 C.F.R. 3102, and the multiple filing regulation, 43 C.F.R. 3112.5-2. The Coyer-RSC agreement provided that if Coyer won the lease, RSC would have the exclusive agency to market the lease for a set time period. Since this provision violated the regulations, RSC attempted to stabilize its position by disclaiming any interest in the lease. RSC tried to hedge its bet by making the disclaimer conditional upon the results of any litigation involving the clause in question. If RSC prevailed, then the exclusive agency interest which it had earlier had would be revived.

The State BLM office denied Easterday's protest and held that the disclaimer was effective. The IBLA reversed, holding that the disclaimer was unilateral action without consideration and that the disclaimer was never communicated to RSC's clients and, as such, was unenforceable and ineffective. Coyer and RSC failed to make an

appearance at the IBLA hearing.

Pursuant to the IBLA decision, the state BLM office rejected Coyer's offer. Coyer filed contemporaneous appeals with the IBLA and this Court. The IBLA held that the matter was res judicata. This Court remanded for a hearing before an administrative law judge so that both sides could be heard.

On July 14, 1980, Administrative Law Judge Mesch rendered extensive proposed findings and conclusions. The IBLA reviewed the proposed findings and adopted them in full on October 14, 1980. This is the decision presently before this Court for review.

The Administrative Procedure Act defines the standard of review to be utilized by this Court. 5 U.S.C. §706(2)(A) states that:

> ... The reviewing court shall ...
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ...

Deference is to be given to the Secretary's interpretation of the regulations. Ballard E. Spencer Trust v. Morton, 544 F.2d 1067 (10th Cir. 1976).

This Court has reviewed the administrative record, the proposed findings of Administrative Law Judge Mesch, and the IBLA decision of October 14, 1980 and is persuaded that the IBLA decision is neither arbitrary, capricious, nor an abuse of discretion, or contrary to law.

NOW, THEREFORE, IT IS

ORDERED that the decision of the Interior Board of Land Appeals dated October 14, 1980 be and the same is hereby affirmed; it is

FURTHER ORDERED that the Motions For Summary Judgment in actions C78-104, C80-370 and C80-372, filed by and on behalf of defendant Andrus be and the same are hereby granted; it is

FURTHER ORDERED that the Motions For Summary Judgment in actions C78-104, C80-370 and C80-372, filed by and on behalf of plaintiffs be and the same are hereby denied; it is

FURTHER ORDERED that the Motion For Summary Judgment in action C78-104 and the Motions to Dismiss in actions C80-370 and C78-104, filed by and on behalf of defendant Easterday be and the same are hereby granted; it is

FURTHER ORDERED that each party is to bear their own costs.

Dated this 5th day of March, 1981.

/s/ Ewing T. Kerr
Ewing T. Kerr
U. S. District Judge

OPINION OF UNITED STATES COURT OF APPEALS
IN LOWEY V. WATT, 684 F.2d 957 (D.C.Cir. 1982),

Frederick W. LOWEY, and Fred L. Engle
d/b/a Resource Service Company, et al.,
Appellants

v.

James G. WATT, Secretary, United States
Department of the Interior, et al.

John A. GALLAGHER, And Fred L. Engle
d/b/a Resource Service Company,
Appellants

v.

James G. WATT, Secretary, United States
Department of the Interior, et al.

J. E. HAM, and Fred L. Engle d/b/a
Resource Service Company, Appellants

v.

James G. WATT, Secretary, United States
Department of the Interior, et al.

Dr. Heinz LICHTENSTEIN and Ursula
Lichtenstein, and Fred L. Engle d/b/a
Resource Service Company, Appellants

v.

James G. WATT, Secretary, United States
Department of the Interior, et al.

James M. ROSS, and Fred L. Engle d/b/a
Resource Service Company, Appellants

v.

James G. WATT, Secretary, United States
Department of the Interior, et al.

Richard K. VITEK, and Fred L. Engle d/b/a
Resource Service Company, Appellants

v.

James G. WATT, Secretary, United States
Department of the Interior, et al.

Nos. 81-1847 to 81-1852.

United States Court of Appeals

District of Columbia Circuit.

Argued March 30, 1982.

Decided July 2, 1982.

Appeals were taken from judgments entered by the United States District Court for the District of Columbia, John H. Pratt, J., 517 F.Supp. 137, affirming decision of the Interior Board of Land Appeals rejecting applications to lease lands. The Court

of Appeals, J. Skelly Wright, Circuit Judge, held that: (1) filing service company's "Amendment and Disclaimer" of possibly illegal exclusive sales agency clause contained in standard agreements clients executed before filing applications for noncompetitive leases to be issued pursuant to Mineral Leasing Act of 1920 was effective to waive any illegal interest of the company in filed lease applications, even though the company received no new consideration for such "Amendment and Disclaimer" and did not give its clients immediate notice of such waiver, and even though the "Amendment and Disclaimer" was conditional in form, and (2) the parol evidence rule did not render ineffective filing service company's "Amendment and Disclaimer."

Reversed.

Appeals from the United States District

Court for the District of Columbia (D.C. Civil Actions Nos. 79-03314, 79-03315, 79-03316, 79-03317, 79-03318 and 79-03319).

Wayne E. Babler, Jr., Milwaukee, Wis., with whom Thomas W. Ehrmann, Milwaukee, Wis., was on the brief, for appellants.

Jacques B. Gelin, Atty., Dept. of Justice, Washington, D. C., with whom Robert D. Clark, Atty., Dept. of Justice, Washington, D. C., was on the brief for appellees James G. Watt, Secretary of the Interior, et al.

Jason R. Warran, Washington, D. C., with whom James W. McDade, Washington, D. C., was on the brief, for appellee Eloise B. Miller.

Before WRIGHT and WILKEY, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT.

J. SKELLY WRIGHT, Circuit Judge:

These cases require us to settle the rights to six federal oil and gas leases, in accordance with the federal common law of contracts and the Mineral Leasing Act of 1920. Appellants are seven private individuals and a "filing service" called Resource Service Company (RSC). The individual appellants and RSC all signed standard agreements, prepared by RSC, under which RSC was to file applications for "noncompetitive" federal leases on behalf of the individual appellants. RSC's standard agreement forms, it turned out, contained a provision of doubtful legality under the applicable Interior Department regulations; if the provision did in fact violate the regulations, no application filed by RSC would be valid. RSC

anticipated filing thousands of applications on behalf of all of its clients between the time questions were first raised about its contract provision and the time the Interior Board of Land Appeals (IBLA) reached a final decision on the legality of the provision. Therefore, the president of RSC attempted to make certain that any applications it filed would be valid, notwithstanding the questionable provision. He executed unilaterally a blanket waiver of the offensive provision--which benefitted RSC exclusively--and he filed the waiver with the state Bureau of Land Management (BLM) offices that administer the federal leasing program.

The IBLA did finally decide that the provision in RSC's standard contracts violated Interior Department regulations. Then, in a second set of administrative adjudica-

tions, the IBLA held that RSC's unilateral waiver did not cure the defect in the standard contracts. It therefore rejected applications to lease lands in New Mexico filed by the individual appellants in these cases, all of whose offers would have been accepted if the waiver were effective. Appellants sought review of the IBLA's decision in the District Court which granted summary judgment against them. 517 F.Supp. 137. Both the IBLA and the District Court relied entirely on the common law of contracts, holding that the waiver was ineffective because it was not made under seal, supported by consideration, or cummunicated promptly by RSC's clients.

We reverse. The unilateral waiver procedure, which RSC had worked out with BLM officials, was a reasonable response to the legal uncertainties surrounding RSC's

standard contracts. With a great deal of ad hoc formality and guarantees that RSC would abide by the waiver, it accomplished the clear mutual purpose of both RSC and its clients, ensuring that the applications RSC filed were not invalid. The procedure was fair, not only to RSC and its clients, but also to other applicants for the federal leases at issue. Therefore, we hold that RSC's waiver effectively removed the offensive provision from its standard contracts. The Interior Department remains free to enact new regulations or interpret existing regulations prospectively so as to require extra procedures for removing illegal provisions from standard leasing service contracts, but it erred in supposing that RSC's waiver was ineffective as a matter of common law.

I

The facts of these cases are more com-

plicated than the legal questions upon which our resolution of the cases turn. Although the cases before us involve only oil and gas leases for federal lands in New Mexico, much of the background concerns RSC-filed applications for leases in Wyoming as well.

A. The Noncompetitive Leasing Program

Under the Mineral Leasing Act of 1920, the Interior Department was authorized to award oil and gas leases for lands not "within any known geological structure of a producing oil or gas field" without competitive bidding to "the person first making application for the lease who is qualified to hold a lease."[1] For many years the Department has followed a procedure for posting notices of parcels available for noncompetitive leasing in the BLM office for the state in which the lands are located,

together with a deadline for filing applications to lease. All applications filed before the deadline are deemed to have been filed simultaneously, and the BLM office holds a drawing early in each month to award the leases.[2] Three applications are drawn for each parcel. If the person filing the first-drawn application qualifies to hold the lease, the lease is awarded to that person; if not, it is awarded to the second-drawn applicant, and so forth.

In effect, this procedure creates a lottery for awarding leases. The program is understandably popular. Many of the parcels contain oil or gas in commercial quantities, even though they fall outside of known oil or gas fields. The person to whom a lease is awarded is often able to assign it to an oil company for substantial payments and royalties, depending on the likeli-

hood that the leased parcel contains oil or gas.

All applications for leases must be filed on a standard "drawing entry card," and the applicant does not qualify to hold a lease unless the application comports with Interior Department regulations. Two of those regulations are pertinent to these cases. First, a "sole party in interest" regulation requires the person or persons submitting an application to identify on the face of the drawing entry card all parties having an "interest" in the application. 43 C.F.S. & 3102.7 (1981). An "interest" includes any "claim * * * to an advantage or benefit from a lease * * * or any defined or undefined share in any increments, issues, or profits which may be derived from * * * the lease based upon or pursuant to any agreement or understanding existing at the time when the

application or offer is filed." Id. § 3100.0-5. Second, a "multiple filing" regulation prohibits any "arrangement entered into prior to selection (drawing) which gives any party or parties more than a single opportunity of successfully obtaining a lease or interest therein." Id. § 3112.6-1(c). Failure to comply with either regulation disqualifies an application. Id. § 3112.6-1(b)-(c).

B. Resource Service Company

RSC is one of a number of "filing services" that have emerged in connection with the noncompetitive leasing program. The filing services publicize the opportunities of the program and, for a fee, prepare and submit drawing entry cards on behalf of members of the public. They also select the parcels for which applications should be filed, keeping track of which parcels

available for leasing are likely to have commercial value.[3]

From its organization in 1973 until March 1978, RSC used a set of standard service agreements in signing up clients. The agreements provided that, for each application RSC prepared on behalf of a client, the client would pay RSC $10 to cover the Interior Department's filing fee and a service fee to RSC of between $6 and $10, depending on the number of applications the client wished to file. Typically, the client would sign a certain number of drawing entry cards and prepay its fees to RSC; RSC would then select the parcels on which applications would be submitted, complete the card, and file it with the appropriate state BLM office on or before the deadline for applications for that parcel.

In addition, the standard service agree-

ments granted RSC an exclusive right for five years to negotiate sales or assignments of any leases its clients actually won, and to receive a set percentage of the proceeds from a lease during its first five years of operation. The clients retained the right to disapprove any negotiated price or to withhold their leases from the market until the five-year period had expired. This additional clause became known as the "exclusive sales agency provision," and the marrow of these cases is RSC's attempt to disclaim it. It was apparently drafted by counsel in Milwaukee, Wisconsin, where RSC had its principal place of business,and appellees have not challenged RSC's assertion that it believed in good faith--albeit, as events developed, mistakenly--that the exclusive sales agency provision did not give RSC an "interest" in its clients'

applications.

C. The "Amendment and Disclaimer"

For the first three years of its operations, RSC's service agreement went unchallenged. RSC submitted applications on behalf of its clients to state BLM offices in Wyoming, Colorado, and New Mexico. Occationally, applications prepared by RSC were drawn first, and RSC clients were routinely awarded leases without protest.

In December 1976, however, an applicant for a lease in Wyoming whose card had been drawn second protested the award of the lease to the first-drawn applicant, an RSC client, on the ground that the exclusive sales agency provision gave RSC an interest in its client's application that had not been disclosed on the drawing entry card. RSC learned of the protest shortly after it was filed, and it faced an obvious dilemma.

An initial ruling from the Wyoming BLM office might not come for months, and no matter how the office ruled its decision could be appealed to the IBLA and thereafter to the courts. Therefore, it might well be months, or even years, before RSC could know with certainty whether the exclusive sales agency provision created an "interest."[4]

In the meantime, state BLM offices were holding new drawings every month. If RSC continued to file applications on behalf of clients who had signed its standard agreement, it risked that all the applications would violate the sole party in interest regulation and, because RSC filed applications on behalf of more than one client for desirable leases, the multiple filing regulation. On the other hand, developing a new set of forms and getting all of its

clients to sign new agreements would entail considerable delay and expense, and the process might not be completed in time for drawings in the upcoming months. In the end, that effort would be wasteful if the IBLA decided that the provision did not create an interest.

Accordingly, on January 13, 1977--before the Wyoming BLM office had reached an initial decision on the interest question -- RSC's president executed a document which he titled an "Amendment and Disclaimer." Following a description of the uncertainty concerning RSC's standard service agreement and RSC's belief that it did not give RSC an interest in its clients' applications, the document stated:

> NOW, THEREFORE, I, FRED ENGLE, d/b/a RESOURCE SERVICE COMPANY, do hereby state and aver that I do hereby waive and re-

nounce any exclusive agency which I may have by reason of said service agreements with said offerors from and after this date.

I do hereby further state and aver that said waiver and renunciation shall become operative forthwith and shall inure forthwith for the benefit of all said offerors.

I do hereby further state and aver * * that this disclaimer is being made in the event that a determination is made that the exclusive agency vests in me an interest in the lease or offer to lease which may disqualify the offeror.

* * *(I) in the event a determination is made following the exhaustion of all administrative remedies and judicial remedies that said exclusive agency does not constitute an interest * * * this Amendment

and Disclaimer shall be null and void as if never executed.

Joint Appendix (JA) 48-49. The document was signed, witnessed, and notarized. One copy was sent to the Wyoming BLM office immediately; another was sent to the New Mexico BLM office by certified mail on March 29, 1977, see id. 77.

RSC also negotiated a set of procedures with the BLM office in Wyoming, where RSC filed the vast majority of its lease applications. RSC agreed that whenever one of its clients won a lease drawing, it would notify the client that the client was not bound by the exclusive sales agency provision. It would then ask the winning client to sign a new sales agency agreement.[5] Furthermore, RSC agreed to provide the BLM office with the names of any RSC clients who won drawings, so that the BLM could make certain that RSC

had notified the client that the exclusive sales agency provision was not binding, and so that the BLM could discover whether RSC was using improper methods to get its winning clients to sign new agreements.[6]

RSC did not, however, inform all of its clients about its "Amendment and Disclaimer"--only those clients who won drawings, and then only after they had won. RSC also continued to use its old standard service agreement forms in signing up new clients. It did not begin using revised forms, without the exclusive sales agency provision, until after the IBLA had held that its old forms created an interest in RSC and the time for seeking judicial review of the IBLA's decision had expired.[7]

D. The New Mexico Drawings

The seven individual appellants in these cases are all RSC clients for whom RSC sub-

mitted applications for noncompetitive leases on parcels in New Mexico. One of the seven had signed an RSC service agreement long before any doubts arose as to its validity. The others all became RSC clients during the period between the time RSC executed its "Amendment and Disclaimer" and the time when the IBLA's decision that the old forms were invalid became final.[8] Accordingly, all seven individual appellants signed service agreements with RSC that contained the exclusive sales agency provision, but none of them learned about the "Amendment and Disclaimer" until after their applications had been drawn.

The applications of James Ross and Richard Vitek were filed on November 25, 1977, roughly eight months after RSC filed its "Amendment and Disclaimer" with the New Mexico BLM office. Ross and Vitek were

the first RSC clients to have their applications drawn in a New Mexico drawing; the other appellants' applications were submitted and drawn over the next four months.

Immediately after learning that the Vitek and Ross applications had been drawn, RSC sent a letter to the New Mexico BLM office describing the notification procedure it had successfully followed with the Wyoming BLM office and providing copies of all its correspondence with the Wyoming office on the matter. JA 54. RSC then followed the same procedure it had used with its clients in Wyoming. After each New Mexico drawing, it sent a letter to the appellant whose application had been drawn, stating in part:

> To remove any doubt that our clients are in fact the exclusive owners of their leases and to protect their best interests we have informed the Bureau (BLM) that we

do not consider this exclusive clause binding if it created an interest in us. The Bureau has suggested that if the Sales Agreement is signed after the drawing there is no question presented.

I am therefore enclosing two copies of our Sales Agreement which I would appreciate your signing and return(ing) one copy to me * * *. Please note that the Sales Agreement spells out the same terms as provided in the Service Agreement. We are confident that our past record of sales and our extensive contacts will enable us to put our best efforts to the sale of this lease to your profitable advantage. * * *

JA 75, 84, 89, 94, 99, 105 (emphasis in original). RSC also had its clients send a copy of this letter, the original service agreement they had signed, and any new sales agency agreement they signed to the New Mexico

BLM office.

All of the individual appellants signed the new, post-drawing sales agency agreement. Ross, however, altered its terms so as to make RSC's sales agency non-exclusive, and RSC accepted the change. See id. at 95.

Second-drawn applicants in each of the New Mexico drawings--including appellee Eloise B. Miller, whose application for one parcel was drawn second to Ross'--filed protests to block award of any of the leases to RSC clients. Between March 13 and March 23, 1978 the New Mexico BLM office issued rulings rejecting the applications to lease filed on behalf of six of the individual appellants, and on June 8 it rejected the seventh individual appellant's application.[9]

E. The IBLA and District Court Decisions

The RSC clients whose first-drawn applications had been rejected by the New Mexico

BLM office appealed that decision to the IBLA. Fourteen months later, in May 1979, the IBLA handed down the decision on review in these cases. Frederick W. Lowey, 40 IBLA 381 (1979). The IBLA, unlike the New Mexico office, took account of the fact that RSC had filed the "Amendment and Disclaimer" in New Mexico long before submitting the lease applications at issue. Id. at 384. Nevertheless, the IBLA held that the "Amendment and Disclaimer" was ineffective as a matter of common law, because there was no consideration to RSC for relinquishing its rights under the exclusive sales agency provision, and because RSC had failed to provide notice of the waiver to appellants until after the drawings. Id. at 387-393.[10] In addition, the IBLA held that the parol evidence rule precluded even considering the effectiveness of the "Amendmend and Disclaimer" as to any service agree-

ments signed after the date it was executed, i.e., as to all of the individual appellants in these cases except John Gallagher.[11]

The losing parties in Lowey and RSC sought review of the IBLA's decision in the District Court for the District of Columbia which granted summary judgment affirming the IBLA. The District Court held, first, that a de novo construction of the service agreements and the "Amendment and Disclaimer" was required, without deference to the IBLA's ruling, because of the IBLA's rulling "was determined not from its interpretation of its own regulations nor on the basis of 'specialized knowledge gained from experience' in its area of (regulatory) expertise, but rather 'by the application of ordinary rules of contract construction.'" Lowey v. Watt, 517 F.Supp. 137, 142 (D.D.C.1981)(JA 9)

(citing Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-269, 80 S.Ct. 1122, 1125-26, 4 L.Ed.2d 1208 (1960)). The District Court then reached the same conclusion that the IBLA had reached. It held that the "Amendment and Disclaimer" could not alter the obligations in any service agreements signed after it was executed and that, in any event, "the common law and majority rule hold a disclaimer valid only if given under seal or in exchange for consideration." Id. at 142-143. Although the "Amendment and Disclaimer" might also have been valid had appellants relied on it, the District Court found that reliance was precluded by the fact that they did not learn of the document until after the drawings. See id. at 143. The District Court also re-

jected appellants' arguments that the government was estopped to deny the effectiveness of the "Amendment and Disclaimer" by the actions of the Wyoming BLM office and that the government could not apply its decision retroactively to applications filed before it announced that it would require waivers of contract provisions to be made with consideration or under seal. See id. at 143-144.

II

(1) Two preliminary considerations require brief discussion before we proceed to the principal issue on appeal. The first is the standard of review. The District Court was correct in holding that no deference is due an administrative decision that rests solely on principles of law unrelated to the statutes or regulations that the agency regularly interprets. Where an agency decision is explicitly based on principles of contract

interpretation "as announced by the courts," a reviewing court must make an independent determination of the governing principles. Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270, 80 S.Ct. 1122, 1126, 4 L.Ed.2d 1208 (1960); cf. Cleveland Cliffs Iron Co. v. ICC, 664 F.2d 568, 591-592 (6th Cir. 1981)(implying that the ICC could not undertake the "purely judicial task" of determining the validity and effect of contracts). For the same reason, the Court of Appeals is bound to make its own assessment of legal principles, without the deference we accord District Court rulings that involve questions of fact. Texas Gas Transmission, supra, 363 U.S. at 270, 80 S.Ct. at 1126; see Winkler v. Andrus, 594 F.2d 775 (10th Cir. 1979).

(2) Second, neither the District Court, nor the IBLA, nor any of the parties, has

identified what law provides the standards by which the effectiveness of RSC's "Amendment and Disclaimer" should be judged. All seem to assume, without making the assumption explicit, that the question before us is governed by federal law. That assumption is correct. Although federal law does not govern all questions of contract interpretation involving leases issued under the Mineral Leasing Act of 1920, see Wallis v. Pan American Petroleum Corp., 384, U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), it applies to questions with significant implications for federal policy and which require uniform resolution throughout the federal system. See Wallis, supra, 384, U.S. at 67-69, 86 S.Ct. at 1303-04; Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943).

The precise question raised is whether the Interior Department erred in rejecting the individual appellants' offers to lease, after their application cards were drawn, on the ground that RSC's "Amendment and Disclaimer" was ineffective. Were state law to govern that question, it would "lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states," and it would "subject the rights and duties of the United States to exceptional uncertainty." Clearfield Trust, supra, 318 U. S. at 367, 63 S.Ct. at 575. Uncertainty concerning RSC's standard agreement and the effectiveness of its waiver affects the rights to lease approximately 70 parcels of federal land. If the law to be applied were that of the state in which the lands are located, a single applicant might find that he or she

had filed a valid application in one state and an invalid application in another, although except for the number of the parcel the applications would be identical.[12] If, on the other hand, the law to be applied were that of the state in which a service agreement was signed, one state BLM office would be forced to assess the laws of many distant states to settle the rights from a single drawing.

Wallis was a diversity case, a contract dispute between two private parties of no concern to the federal government except for the fact that their dispute involved a federal lease. These cases, in contrast, arise on petitions for review of administrative decisions; the duties of federal officials in administering the noncompetitive leasing program are directly in issue. In such cases state law may be

instructive, useful, and even compelling, so long as it does not conflict with the applicable federal policies. See Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967). But we are not under the same obligation as in diversity cases to search out and follow relevant state precedents. See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 762-770 (2d ed. 1973). Our disposition of this case must take account, as no state's contract law can, of the statutory policies that control the noncompetitive leasing system. See Part III-A infra; D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 472-475, 62 S.Ct. 676, 686-88, 86 L.Ed. 956 (Jackson, J., concurring).

In sum, the decision to accept or reject

applications for noncompetitive leases is a federal decision, which the Interior Department (through the BLM and the IBLA) administers uniformly throughout the nation, and for which Congress has provided uniform federal court review by means of the federal question statute and the Administrative Procedure Act. Questions of contract law affecting that decision should also have a uniform resolution in accordance with federal policies.

III

In January 1977, faced with the possibility of an imminent ruling by the BLM that would effectively prevent it from doing business, RSC took what seemed reasonable steps to protect its clients and itself. It formally stated its intent not to enforce the possibly illegal exclusive sales agency provision and delivered a document to that effect

into the hands of the BLM, which had both motive and ability to make certain that RSC abided by its promise. The unilateral method RSC chose had the twin virtues of speed--a crucial factor, since the January and February 1977 drawings were about to occur--and inexpensiveness. If the law considers RSC's actions a legal nullity, there must be some good reason for it.[13] We conclude that, in the context of the noncompetitive leasing program, RSC's "Amendment and Disclaimer" was effective to waive the offensive provision in its service agreements, thus curing the possible defect in its clients' applications before they were ever filed.

A. Policies of the Noncompetitive Leasing Program

The IBLA and the District Court relied solely on the common law of contracts in holding that RSC's "Amendment and Disclaimer"

was ineffective. Whatever our view of contract law, however, we would not accept what RSC did if it were inconsistent with the regulations or the policies governing the noncompetitive leasing program. Yet as the IBLA and the District Court implicitly recognized, the program's regulations do not prescribe any particular method for waiving impermissible interests before applications are filed, and we find that RSC's actions were not inconsistent with the policies of the program.

The noncompetitive leasing program is open to all--any citizen can stand on an equal footing with large oil companies in seeking to take advantage of its benefits. Thus an overarching policy of fairness is intrinsic to the program. At the same time, administering such an egalitarian program can be difficult, and the Interior Depart-

ment was broad discretion to frame per se rules, even if they may produce harsh results, to simplify its administrative task. See Brick v. Andrus, 628 F.2d 213, 216 (D.C. Cir.1980); Dawson v. Andrus, 612 F.2d 1280 (10th Cir. 1980). But where innocent applicants could not have had notice of a supposed per se rule before their applications were rejected, the courts have not allowed administrative convenience to obscure considerations of fairness. See, e.g., McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981); Brick v. Andrus, supra; Winkler v. Andrus, supra.

Most people who want to file applications for noncompetitive leases have little choice but to employ a filing service to scout the best opportunities, and to rely on the filing service to make sure that the applications conform to Interior Department regulations. If we were to hold, as a matter of common law, that a filing service's rea-

sonable efforts to cure a defect in its contracts with its clients were insufficient, our decision would not only penalize blameless individuals like the individual appellants in these cases, but it would have a deleterious effect on the program as a whole. Private individuals would doubt the fairness of the program, and they might become wary of seeking to take advantage of it. And filing services would be forced to take expensive precautions that would only, in the end, require them to raise their fees, thus putting the program out of the reach of individuals of modest means. Not only would that tend to limit the pool of potential applicants to the wealthy and sophisticated, but it would also reduce the income that the government earns from the filing fee it charges for each application.[14] See R. M. Barton (I), 4 IBLA 230, 234 (1972)

(Thompson, ALJ, concurring).

Nor is it unfair to appellee Miller and others whose applications were drawn second to hold that RSC could waive the exclusive sales agency provision in the manner it chose. All qualified applicants who have submitted drawing entry cards that comply with Interior Department regulations should have an equal chance to obtain a lease. If an application is not in compliance with the regulations when it is filed, then the applicant has no right to participate in the drawing and no right to a lease if his or her application is drawn first. But if an application is valid when filed and drawn, no matter what the applicant had to do to make the application valid, then the rules of the game dictate that the lease must be awarded to the applicant whose card was drawn first. See Udall v. Tallmann, 380

U.S. 1, 4, 85 S.Ct. 792, 795, 13 L.Ed.2d 616 (1965). If RSC effectively waived its interest before submitting any applications on behalf of its clients, then their applications were just as valid as the applications submitted by anyone else, and all had a fair chance to be the first one drawn.

B. Lack of Consideration or Notice

(3) Both the IBLA and the District Court held that RSC's "Amendment and Disclaimer" was ineffective because it was not made for consideration, under seal, or with notice. On appeal the parties before this court rely on general rules which seem to contradict one another. Appellants cite a line of cases from various jurisdictions holding that waiver is essentially unilateral in character and that any intentional waiver of rights acquired by contract is effec-

tive.[15] They argue on that basis that RSC's "Amendment and Disclaimer" was effective to waive the exclusive sales agency provision because it was "knowing and intelligent," and that nothing more should be required. Appellees, defending the result below, counter with a supposed "majority rule" that a waiver of contract rights is not effective unless made for consideration or under seal, or unless it induces reliance in the other party to the contract.[16] Neither rule is as generally applicable as its proponents claim, but we find that these cases fit within the narrow category of cases in which neither consideration nor notice is required to make a unilateral waiver of contract rights valid.

In the type of situation presented by these cases, appellees' broad "majority rule" is rejected by the Restatement (Second)

of Contracts and the Uniform Commercial Code. Both sources permit modification of contractual duties without consideration in the context of adjustments to an ongoing business relationship. Under the topic "Contracts Without Consideration," the Second Restatement provides:

> A promise modifying a duty under a contract not fully performed on either side is binding
>
> (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made * * *.

Restatement (Second) of Contracts § 89 (1981);[17] cf. U.C.C. § 2-209(1)(agreement modifying a sales contract needs no consideration). Since the service agreement between RSC and its clients had not been fully performed by either side, the effec-

tiveness of the "Amendment and Disclaimer" is governed not by the presence or absence of consideration, but by Section 89's "fair and equitable" standard.

Comment b to Section 89 explains that the "fair and equitable" standard in subsection (a) requires not only absence of coercion but also "an objectively demonstrable reason for seeking a modification." Other factors to be considered include the relative financial strengths of the parties, the formality with which the modification is made, and the extent to which the new promise is performed. 1 Restatement (Second) of Contracts § 89, comment b, at 238 (1981). The main purpose of this inquiry is to distinguish between situations in which the parties to an existing contract attempt to cope with unforeseen difficulties, the risk of which was not allo-

cated in the original agreement, and situations in which one party "holds up" the other for increased compensation. See Angel v. Murray, 113 R.I. 482, 322 A.2d 630, 634-636 (1974) (explaining draft version of Section 89); cf. Lange v. United States, 120 F.2d 886 (4th Cir. 1941); Linz v. Schuck, 106 Md. 220, 67 A. 286 (1907) (cases reaching similar results before Second Restatement).

The situation that RSC confronted in January 1977 is closely analogous to the situations for which Section 89 was framed. In entering into the original service agreements, neither RSC nor its clients anticipated that the exclusive sales agency provision would frustrate the unmistakable overall purpose of the agreement--filing valid applications for noncompetitive leases. The

"Amendment and Disclaimer" was both drafted and executed by RSC, the party with superior financial position, so that there is no reason to suspect that RSC was somehow improperly coerced into relinquishing its rights. The ad hoc formality employed--witnessing and notarization of the document, and delivery of it to the BLM--provides substantial evidence that RSC considered the seriousness of its actions and intended to be bound by them. It is impossible to presume that RSC placed its "Amendment and Disclaimer" in the hands of government officials, with whom it dealt on a regular basis, in the expectation that it could renege on its promise without suffering serious consequences. Furthermore, the record shows that RSC in fact scrupulously abided by its waiver and the rest of its agreement with the Wyoming BLM office, not only in these cases but in approximately 60 other cases.

These cases do not come precisely with-

in the rule of Section 89, but the reasons why they do not come within Section 89 reinforce rather than undermine our conclusion that consideration was not required. Section 89 requires that the parties to an ongoing business relationship not have allocated the risk of unforeseen events between them prior to the occurrence of the event that leads to a modification of their agreements. Cf. Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (company cannot claim that unanticipated events made performance under original contract impracticable where the contract allocated risk from those events to the company). Under its service agreement, RSC clearly bore the responsibility of making sure that the applications it prepared on behalf of its clients complied with Interior Department regulations. Not only was

RSC in a far better position than its clients to inform itself about the regulations, but its promotional literature expressly promised to "take() care of everything" concerning compliance with the regulations, JA 119. Moreover, if the BLM had held RSC-prepared applications invalid because of the service agreement, the law would have given its clients a remedy against RSC for damages.

> Where the illegality of a bargain is due to * * * statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifi-

ably ignorant, or for losses incurred or gains prevented by non-performance of the bargain.

Restatement of Contracts § 599 (1932); see 6A A. Corbin, Contracts § 1539 (1962 ed.); cf. Falls Lumber Co. v. Heman, 114 Ohio App. 262, 181 N.E.2d 713 (1961) (agent holding itself out as skilled in supervising all phases of construction loans was responsible to principal when it allowed cost of construction to exceed funds available).[18]

RSC, however, did not go as far as Section 89 would have permitted it to go if the risk of invalidation by the Interior Department had not been allocated to RSC in the original agreements. Section 89 permits "modification" of other party's contract rights in the face of unforeseen events. If one party alone bears the risk of loss, "modifying" the other party's rights without

new consideration would be inappropriate, because it would give the party facing a loss leeway to coerce a blameless promisee into sharing that loss. But the party who bears the risk of loss may waive its own rights without affecting the other party's rights. Cf. U.C.C. § 2-209(4) (legally insufficient attempt at modification may constitute a waiver). In fact, the law does not permit a party who knows that a bargain is illegal to exact compensation for waiving its rights under the illegal portion of the bargain. See 6A A. Corbin, Contracts § 1529 at 793 (1962 ed.).

(4) The rule urged by appellants, that intentional waivers do not require consideration, applies in this context even if it does not apply generally. When one party assumes the risk that its contract with another will be found to violate rules of

an administrative character, it may waive offensive provisions that inure solely to its benefit without further consideration from the other party, in order to accomplish the essential purpose of the original contract. Courts will examine the waiver only to determine if there are sufficient indications of intent and fairness to ensure that waiver was what the parties intended, and not renunciation of the entire contract. On that standard, it is clear that RSC's waiver was not invalid for lack of consideration.

Nor was immediate notice to RSC's clients required to make the "Amendment and Disclaimer" an effective waiver. Notice has two functions: it may cause the party receiving notice to rely on the communication, and it may help prove that there was a "meeting of the minds" between the parties so as to form an enforceable agreement. The first

function is not relevant to the cases at hand, because if consideration was not required, neither was reliance. The factors that make RSC's waiver valid without consideration apply as well to the substitutes for classical consideration, reliance and the seal. As to the "meeting of the minds," the requisite agreement was provided when RSC and its clients contracted to have RSC file valid applications for noncompetitive oil and gas leases. The positions of the parties and the context provided by law implied that RSC would give up part of its consideration if that were required to make the applications valid, or pay damages if the applications were invalid through some fault of RSC. No further agreement was required for RSC to live up to its side of the bargain.

C. Parol Evidence Rule

(5) Finally, appellees contend that the "Amendment and Disclaimer" could not be effective to waive the exclusive sales agency provision in any agreements signed after the date on which the document was executed. Under the parol evidence rule, "A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them." Restatement (Second) of Contracts § 213(1) (1981). However, it is always a preliminary question whether the parties intended that the later agreements be "integrated," and in making that determination a court may consult "all relevant evidence," see id. at comment b, including documents that predate the later agreement, see id. § 214. See 15 S. Williston, Contracts § 1826 at 486-487 (3d ed. W. Jaeger 1972) (extent to which later agreement rescinds earlier inconsistent promises is always a question of intent and

interpretation); U.C.C. & 2-208(1) (repeated performance of inconsistent promises may explain or modify an agreement). Insofar as possible, the agreement must be interpreted to effectuate the principal purpose of the parties and to harmonize the parties' statements of intent. See Restatement (Second) of Contracts & 202 (1),(5) (1981).

(6,7) Against this background it smacks of absurdity to suggest that RSC and its clients intended agreements signed after the "Amendment and Disclaimer" to supplant it. First, that would imply that the "agreement" was an agreement to do nothing, since not only was the exclusive sales agency provision unlawful (and therefore unenforceable), but the BLM had been alerted to it and would make certain it was not enforced. Second, with respect to stan-

dardized agreements the law holds that no term is part of an agreement if the party who prepared the form has reason to believe that the other party would not have assented if it knew the form contained that term. See Restatement (Second) of Contracts § 211(3) (1981). RSC certainly had reason to believe that its prospective clients would not sign an agreement if they knew it contained a term that would render it impossible to accomplish the clients' purpose in signing the agreement. For its part, RSC conclusively demonstrated that it did not regard the later agreements as integrated. It scrupulously notified the BLM whenever applications filed on behalf of clients who signed later agreements were drawn first or second in a drawing, and it informed the clients that they were not bound by the exclusive sales agency provision.

In sum, it would be artificial to interpret the service agreements signed after the date of the "Amendment and Disclaimer" as integrated agreements superseding RSC's waiver. The parol evidence rule does not require us to disregard the "Amendment and Disclaimer" in considering whether RSC had waived its interest in the individual appellants' applications before they were filed.

For all of the foregoing reasons, we hold that RSC's "Amendment and Disclaimer" was effective as a matter of common law to waive the exclusive sales agency provision in the standard service agreements that appellants in these cases signed. The Interior Department erred in rejecting the individual appellants' offers to lease on the ground that their applications had failed to disclose all parties with an

interest in the applications, because RSC had no interest in any of its clients' applications after it executed the "Amendment and Disclaimer."

IV

We have decided the basic question in these cases as it was framed by the IBLA and the District Court. Neither suggested that the Mineral Leasing Act of 1920 or any of the Interior Department's regulations governing the noncompetitive leasing program created special requirements for waiving illegal contract provisions. Nor did either point to instances in the past where the Department has required more than the common law does for parties to waive their rights under a contract. Thus there was no positive statement of law or established practice to put appellants on notice that RSC could not, in the situation

it confronted, waive its exclusive sales agency without more formality than it used. See Brick v. Andrus, supra, 628 F.2d at 216-217; Dawson v. Andrus, supra, 612 F.2d at 1283.

Our holding in these cases does not preclude the Department from establishing such requirements as consideration, seal, or prompt notice to all affected clients, either as an exercise of its rulemaking powers or by adjudication on the basis of existing statutes and regulations. That possibility, however, cannot alter our disposition of these cases. Under the principles in McDonald v. Watt, supra, 653 F.2d at 1042-1046, and Runnells v. Andrus, 484 F.Supp. 1234 (D. Utah 1980), the Department could not apply its new requirements to applications filed before the requirements were announced. Before the IBLA's opinion

in Alfred L. Easterday appeared, see note 10 supra, appellants could not have known that the Department considered RSC's waiver ineffective, and even after Easterday the Department only stated that it thought the waiver ineffective as a matter of common law. Assuming that, at this late date, the Department could find some authority in its statutes or regulations for a rule more stringent than the common law, retroactive application of that rule would not advance any statutory policy sufficient to overcome the prejudice to the individual appellants in these cases, who "believed in good faith that they are complying with (the) letter (of the regulations) as that letter had been spelled out in previous decisions and in the practice of the BLM." See McDonald v. Watt, supra, 653 F.2d at 1045-1046.

Accordingly, the judgment of the District Court is

Reversed.

Footnotes:

1. 30 U.S.C. & 226(c) (1976) (the statutory language was amended somewhat in 1981, see Pub.L.No. 97-78, 95 Stat. 1070 (1981)). Persons awarded noncompetitive leases must pay the government a rental fee of $1.00/acre as well as a royalty of 12.5% on any oil or gas removed from the leasehold. See id.; 43 C.F.R. & 3103.3-2(1)(1981). The term of noncompetitive leases is five years, renewable for another five years at the option of the leaseholder. Thereafter the lease may be renewed only if oil or gas is being produced in commercial quantities. See 43 C F.R. & 3107.1-3 (1981).

2. This court determined that the procedure followed comports with the statutory authority for the noncompetitive leasing program in Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir.), cert. denied, 373 U.S. 951, 83 S.Ct. 1681, 10 L.Ed.2d 706 (1963). See also McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).

3. Filing services have been a familiar part of the noncompetitive leasing program for years, see, e.g., Robertson v. Udall, 349 F.2d 195 (D.C. Cir. 1965), and to a large extent they are a necessary adjunct to the program. They make it

possible for people like the individual appellants in these cases to participate on an equal footing with large oil companies. Without filing services, only wealthy individuals or corporations could afford the time and expense involved in learning which parcels in which states are available for leasing, and which of these parcels have the best chance of containing oil or gas. They therefore greatly expand the pool of potential applicants. See R. M. Barton (I), 4 IBLA 230, 234 (1972) (Thompson, ALJ, concurring).

4. In fact, the Wyoming office of the BLM did not sustain the protests filed against the RSC clients until March 1977. The IBLA subsequently affirmed the initial decision of the Wyoming office not to issue leases to the RSC clients whose applications had been challenged. Sidney H. Schreter, 32 IBLA 148 (1977); Lola I. Doe, 31 IBLA 394 (1977). These decisions held that RSC's standard service agreements created an interest in RSC as defined by 43 C.F.R. § 3100.0-5, and thus that any applications prepared by RSC that did not disclose the interest violated the sole party in interest regulation. Furthermore, if RSC filed applications on behalf of more than one client for any particular parcel, the multiple filing regulation would also be violated. The Doe and Schreter decisions were announced by the IBLA in September 1977. RSC and its clients had 90 days to seek judicial review of the decisions, but they ultimately declined to do so. When the time for seeking judicial review of the Doe and Schreter decisions expired, RSC began

the process of drafting new standard service agreement forms, without the exclusive sales agency provision. See note 7 infra.

5. Under applicable Interior Department precedents, exclusive sales agency agreements between filing services and their clients were permitted as long as they were arranged after the client's application had been drawn. The sole party in interest and multiple filing regulations demand only that there be no such agreement in effect at the time the application is filed and drawn. See John V. Steffans, 74 I.D. 46 (1967).

6. Both the "Amendment and Disclaimer" and the notification procedures were the result of negotiations between RSC and John Erdmann, a legal assistant working in the Wyoming BLM office. The arrangements were later approved by Erdmann's superiors, see JA 34, 36-37, although Erdmann warned RSC that any decisions they made might be protested and appealed to the IBLA, see id. at 40. Over the next 18 months, before RSC was able to replace its old forms with new forms, over 50 RSC clients won drawings conducted by the Wyoming BLM office. Both RSC and the BLM abided by the procedure they had worked out, and the Wyoming BLM office rejected all protests filed against RSC clients. See id. at 40, 55-71.

7. After the period for seeking review of the IBLA's Doe and Schreter decisions had expired, the Wyoming BLM informed RSC that it would have to revise its standard service agreement forms as quickly as possible.

After some initial fencing, RSC submitted a new form acceptable to the BLM in mid-March 1978, and by June 1978 RSC had ceased submitting lease applications based on its old forms. See JA 41, 67-68, 71.

8. The following table shows the names of appellants, when they signed a service agreement with RSC, and when their applications were drawn in drawings conducted by the New Mexico office:

Name	Agreement Signed	Drawing
Frederick Lowey	Dec. 13, 1977	Feb. 7, 1978
John Gallagher	Jan. 16, 1976	Apr.10, 1978
J. E. Ham	Jan. 4, 1978	Feb. 7, 1978
Heinz & Ursula Lichtenstein	Dec. 6, 1977	Jan.10,1978
James Ross	Nov. 16, 1977	Dec.12,1977
Richard Vitek	July 15,1977	Dec.12,1977

9. The various decisions are practically identical, each stating simply that RSC's service agreement created an interest in Fred Engle that was not disclosed on the application, in violation of the sole party in interest regulation, and that RSC had filed many applications in which Engle had a similar interest, in violation of the multiple filing regulation. See Appellees' Supplement to Appendix at 126-143. In addition, the Gallagher and Vitek rulings stated that copies of Engle's "Amendment and Disclaimer" had been filed on February 3, 1978, but that a defect in an application existing at the time of a drawing could not be cured by submission of further information. Id. at 133, 142. No mention was made of the

fact that RSC had filed the disclaimer with the New Mexico BLM office long before the drawings.

10. In Lowey the IBLA relied on and explained further its decision in the first set of appeals that had been taken from the Wyoming BLM office's rejection of protests filed against RSC clients who won drawings in Wyoming, Alfred L. Easterday, 34 IBLA 195 (March 22, 1978). Easterday was the IBLA's first opportunity to consider whether RSC's "Amendment and Disclaimer" cured the defect that Doe and Schreter had identified in applications prepared by RSC, see note 4 supra. The IBLA held that "Engle's waiver was without effect as a matter of law. The original service agreement remained in effect as of the date of the drawing," thus giving RSC an interest in the applications. 34 IBLA at 200. The IBLA's decision to disregard the "Amendment and Disclaimer" was explicitly based on common law contract principles rather than an interpretation of the applicable Interior Department regulations. The RSC client whose application was at issue in Easterday sought judicial review in United States District Court in Wyoming. After a remand to the IBLA occasioned by the loss of part of the administrative record, the District Court eventually affirmed the IBLA's decision. That case is currently pending on appeal before the Tenth Circuit. Coyer v. Watt, 10th Cir. No. 81-1415.

11. See note 8 supra and accompanying

text.

12. Richard Vitek, for instance, won a December 1977 drawing in New Mexico, see note 8 supra, and a January 1978 drawing in Wyoming, see JA 70.

13. See Fuller, Consideration and Form, 41 Colum, L.Rev. 799, 806-810 (1941) (principle of private autonomy).

14. At the time these cases arose, the filing fee for noncompetitive lease applications was $10 per application; now it is $25. See 43 C.F.R. & 3103.2-1(a) (1981). The filing fee is not returned to the applicant if an application is rejected as invalid. Id. & 3112.6-2.

15. See, e.g., Nat'l Bank of Albany Park v. Newberg, 7 Ill. App.3d 859, 289 N.E.2d 197 (1972); Engstrom v. Farmers & Bankers Life Ins. Co., 230 Minn. 308, 41 N.W.2d 422 (1950); Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396 (Tex. 1967); Texana Oil Co. v. Stephenson, 521 S.W.2d 104 (Tex. Civ.App.1975). A similar standard is used when corporations waive their constitutional rights: there must be "an intentional relinquishment or abandonment of a known right or privilege." D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186, 92 S.Ct. 775, 782, 31 L.Ed.2d 124 (1972): see Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 690-691 (6th Cir. 1981).

16. Appellees rely principally on 15 S. Williston, Contracts && 1822, 1826 (3d ed.

W. Jaeger 1972), and cases following that source.

17. None of the parties before this court cited § 89, and apparently it was not cited before the District Court or the IBLA either. This section, which first appeared as § 89D in the 1965 tentative draft of the Second Restatement, was intended in part as an exception to the rule that "moral obligations" do not furnish consideration for a binding promise. See generally 1A A. Corbin, Contracts §§ 186, 210-239 (1963 ed.) (criticizing overgenerality of pre-§ 89 rule). See also Holland v. Martinson, 119 Kan. 43, 237 P. 902 (1925); Reece v. Reece, 239 Md. 649, 212 A.2d 468 (1965) (pre-§ 89 cases recognizing contracts based on moral or legal obligations). For the theoretical underpinnings of § 89, see generally Fuller, supra note 13.

18. See Restatement (Second) of Agency § 401, comment a, at 238 (1958) (paid agent may be liable to principal if agent does something wrongful, negligently or with knowledge).

19. Appelles also claim that the conditional form of RSC's "Amendmend and Disclaimer" rendered it invalid. That contention has no merit. Exclusive sales agencies are not inherently unfair, and the Interior Department allows filing services to make such arrangements with their clients as long as the arrangements are made after the client's application has been drawn. John V. Steffans, supra note 5. There is no suggestion in the record that RSC's clients

did not freely agree to the provision when they signed the original service agreement. The only problem with the provisionwas that it violated Interior Department regulations if executed before a drawing, and that point was not settled at the time RSC filed its "Amendment and Disclaimer." Therefore, there was nothing inherently unfair about a conditional waiver of the provision. See 1A A. Corbin, Contracts § 215, at 295 (1963 ed.), U.C.C. § 2-209(5). By the time the applications at issue in these cases were filed, however, the IBLA's Doe and Schreter opinions had settled that the exclusive sales agency provision in pre-drawing contracts created an illegal interest, and the time for seeking judicial review had expired. See notes 4, 7 supra. Accordingly, the "Amendment and Disclaimer" could no longer be regarded as conditional since the condition precedent to its operation had already occurred.

§ = Section
§§ = Sections

Letter from United States Court of Appeals,
Tenth Circuit, Office of the Clerk,
C404 United States Courthouse, Denver,
Colorado - Dated November 4, 1983

Mr. Wayne Babler, Jr.
Mr. David B. Kern
Mr. Thomas W. Ehrmann
Qualres & Brady
780 North Water Street
Milwaukee, Wisconsin 53202

RE: No. 81-1415 - Donald W. Coyer et al. v. Cecil D. Andrus et al.

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely, yours,

/s/ Howard K. Phillips

Howard K. Phillips, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November Term - November 28, 1983

Before Honorable Olver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

DONALD W. COYER and FRED L. ENGLE, d/b/a RESOURCE SERVICE COMPANY,

Plaintiffs-Appellants

vs.

CECIL D. ANDRUS, Secretary of the Interior, United States Department of the Interior, and EASTERDAY, Alfred L. and Roe J.

Defendants-Appellees

No. 81-1415

This matter comes on for consideration of Appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having

been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk